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No. 224.

UNITED STATES CIRCUIT COURT OF APPEALS.

EIGHTH CIRCUIT.

1806

CHRISTIE GRAIN & STOCK COMPANY, ET. AL.,
APPELLANTS,

vs.

BOARD OF TRADE OF THE CITY OF CHICAGO,
APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MISSOURI,
AT KANSAS CITY.

BRIEF OF PLAINTIFF IN ERROR.

JAMES H. HARKLESS, JOHN O'GRADY
AND CHARLES S. CRYSLER,
Attorneys for Appellants.

FILED
OCT 21 1902
JOHN [illegible] DAN,

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STATEMENT OF CASE.

This cause comes to this Court by appeal from the decision of the Circuit Court of the United States for the Western District of Missouri, sitting at Kansas City, Judge W. C. Hook, holding the Court and rendering the opinion, which opinion is found on page 956 of the Record and reported in 116 Fed., page 944.

The application for the temporary writ on behalf of the Board of Trade was sustained, from which order the Christie Grain & Stock Company and C. C. Christie, appeal to this Court. The Western Union Telegraph Company, the Postal Telegraph Company and the Gold and Stock Telegraph Company were originally made parties defendant to the bill, but the first-named two com-

panies simply enter appearance and took no further part in the controversy. The Gold and Stock Telegraph Company made no appearance. The real and only issue being between the Board of Trade of the City of Chicago as complainants, and the Christie Grain & Stock Company and C. C. Christie, prime defendants and appellants here. The order of the Court sustaining the temporary writ of injunction, is found commencing on page 93 of the Record, and is as follows:

ORDER AND JUDGMENT.

This cause coming on for hearing upon the motion of complainants for a preliminary injunction, it was agreed in open Court that any order should be entered as of July 7th, 1902, the date when the decision was announced, and after reading the bill, affidavits and evidence filed herein, and hearing the argument of counsel, for the respective parties, and being fully advised in the premises,

It is ordered that upon complainant's filing its bond in the usual form, and in the penal sum of five thousand dollars ($5000.00) and with a surety to be approved by the clerk of this Court, a temporary injunction issue herein, restraining, until the further order of the Court, the defendant, Christie Grain & Stock Company and C. C. Christie, and each of them, either acting in his or its own behalf or as a member of any firm, or as agent or officer of any other person, firm or corporation, and also each and every of the agents, employes and servants of said defendants, from receiving or acquiring, directly or indirectly, the continuous quotations of the Chicago Board of Trade, (by which is meant all quotations wherein the price of any commodity shall be quoted oftener than at intervals of ten minutes) or any of them, until they or he, or the person, firm or corporation for which they or any of them shall be acting as agent, officer or employe, shall have first acquired the right to receive the said quotations by contract or purchase from complainant, or such telegraph company as shall lawfully have acquired from the complainant the right to sell and dis-

tribute its said market quotations; and also from directly or indirectly using, giving away, posting, selling or distributing said continuous quotations, and from aiding, abetting or assisting any other person, firm or corporation in receiving, selling or distributing the said continuous quotations, until the right to do so shall have been lawfully acquired by said defendants or other persons, as aforesaid.

Said Christie Grain & Stock Company and C. C. Christie pray for an appeal to the United States Circuit Court of Appeals, for the Eighth Judicial Circuit, which appeal is hereby granted.

The Court having heretofore announced to said defendants its decision, the terms upon which the supersedeas bond should supersede the injunctive portion of this order, and the date when the order should be made in time for and for the purpose of permitting them to immediately perfect their appeal and docket the cause in the Appellate Court, it is further ordered: The supersedeas bond for such appeal is hereby fixed at $3,000.00 and it shall suspend the injunctive portion of the order pending the appeal upon the following conditions only, however, (which are continuing conditions precedent to such suspension), i. e., said defendants shall immediately perfect their appeal and file their transcript in said Court of Appeals on or before the 11th day of August, 1902, and that the appeal be heard at the earliest time at which said Court will hear the same.

August 5, 1902.

(Signed) WILLIAM C. HOOK,
Judge.

BILL OF COMPLAINT.

The bill of complaint is found commencing on page 3 and ending on page 22 of the Record. This bill set up and charged that the Board of Trade of the City of Chicago were residents of the City of Chicago and State of Illinois, and bring their action against the Christie Grain and Stock Company, a corporation under the laws of the State

of Missouri, having its place of residence at Kansas City, and C. C. Christie, a citizen of Missouri, and a resident of Kansas City, the Western Union Telegraph Company, the Postal Telegraph Company and the Gold and Stock Telegraph Company, corporations organized under the laws of the State of New York; that the Board of Trade of the City of Chicago was a private corporation organized under a special charter granted to it by the State of Illinois on the 18th of February, 1859, that the objects of its incorporation was "to maintain a commercial exchange; to promote uniformity in the customs and usages of merchants; to inculcate principles of justice and equity in trade; to facilitate the speedy adjustment of business disputes; to acquire and disseminate valuable commercial and economic information and generally to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits;" and was given authority to make rules and regulations for the government of its affairs, and to admit and expel persons in membership in such manner as its by-laws should require, and to carry on any business usually conducted by boards of trade or chambers of commerce; and that it was not authorized by its charter to conduct a telegraph business, and that its charter did not impose upon it the duty of imposing on the public or any person whatever, the knowledge of quotations of the prices made in transactions between its members within its exchange hall. It then alleged that the Western Union and Postal Telegraph Companies, engaged in a general telegraph business throughout the United States, and that the Gold and Stock Telegraph Company was a subsidiary company of the Western Union Telegraph Company; that C. C. Christie was the president and manager of the Christie Grain & Stock Company; and "that the said Christie Grain & Stock Company is engaged in the business of conducting a 'bucket shop,' or other place wherein is conducted, or permitted the pretended buying or selling of the shares of stock or bonds of any corporation, or petroleum, cotton, grain, provisions or other produce, either on margins or otherwise, without any intention of receiving and paying for the property so bought or delivering the property so sold, and wherein is conducted or permitted the pretended buying or selling of such property on margins and wherein the party buying

or selling any such property, or offering to buy or sell the same, does not actually intend to receive the same if purchased or delivering the same if sold. And wherein is conducted the business of making or offering to make contracts, agreements, trades or transactions respecting the purchase or sale or purchase and sale of any grain, provisions, cotton, stocks, bonds or other securities wherein both parties thereto or the said Christie Grain and Stock Company, contemplate or intend that such contracts, agreements, trades or transactions shall be or may be, closed, adjusted or settled according or with reference to the public market quotations of prices made on any board of trade or exchange upon which the commodities or securities referred to in said contracts, agreements, trades or transactions are dealt in and without a bona fide transaction on such board of trade or exchange, and wherein both parties or said Christie Grain and Stock Company contemplate or intend that such contracts, agreements, trades or transactions shall be or may be deemed closed or terminated, when the market quotations of prices made on such board of trade or exchange for the articles or securities named in such contracts, agreements, trades or transactions, shall reach a certain figure."

That the complainant had provided an exchange building in Chicago at upwards of a cost of $1,000,000.00, the maintaining of which, together with its exchange hall, cost more than $240,000.00 per year, $100,000.00 of which was raised by assessments on its members and that the price of membership in its exchange was worth $2,300.00, and that any person of good character and business integrity could become a member by paying an initiation fee or in lieu thereof acquiring a membership from some other member, which is purchasable in the market. That the exchange hall was provided for the exclusive use of the members of the exchange, which met on every business day from 9:30 A. M., to 1:50 P. M., every business day except Saturday, when it meets from 9:30 until noon, in which the members buy and sell for themselves, or as brokers for their customers, for present and future delivery, all kinds of grain, the value of said transactions aggregating many bushels of grain and many millions of pounds of hog products annually, and that the exchange had become one of the greatest grain

and provision markets of the United States; that the purchases and sales are made by open *viva voce* bidding and that the knowledge of the prices thus made on said transactions upon the exchange had become a species of property of large value, and the telegraph companies were willing to pay the complainant large sums of money for the privilege of receiving instantaneously said quotations and selling same to their customers, and that many persons in the United States engaged in the grain business are willing to pay, and for many years have paid, the telegraph companies large sums of money therefor. That the complainant realizes from the sale of its quotations in the City of Chicago, alone, more than $10,000.00 per year, and that the quotations are such a peculiar kind of property that their value to the complainant depended upon its retaining the power to confine the transmission and distribution of said quotations to telegraph companies and distributing companies as may contract with them therefor, and that the value of the quotations would be much impaired, if not wholly lost, if persons were allowed to receive or take them without right, surreptitiously or by theft, and use the same in distributing them to the public for use, their value depending upon the complainant preventing the quotations from being generally used or surreptitiously published in a way to make them free to the public, and that if any telegraph company or other person was permitted to promptly acquire said quotations, surreptitiously or by theft, and without paying for the same, the telegraph companies contracting with the complainant for said quotations, and agreeing to pay therefor, would be put to such a disadvantage in competition with such telegraph companies or persons acquiring the same surreptitiously and without paying the complainant, as to prevent the contracting telegraph companies from long continuing to purchase the quotations."

The bill then proceeds to charge that these quotations are collected and distributed by experienced persons placed in the exchange hall, where the buying and selling of the commodities are taking place, usually known as "pits," who take down quotations and immediately transmit them to telegraph operators on the exchange floor, who, in turn, transmit them by electric transmitters over telegraph wires, which are connected with the transmitter in the ex-

change hall, and thence to the various offices and places of business of persons in the City of Chicago, who desire to and are willing to pay the telegraph company for the same. Wires in the exchange hall being connected by what is called "tickers" and the quotations are thus sent out instantaneously and retransmitted by the telegraph companies by telegraph instruments called "Morse instruments." Which quotations are instantaneous, continuous quotations, and thus in turn convey to persons all over the United States and in the cities and towns thereof, within twenty seconds after the prices are made on the exchange hall, and that the yearly expense of this service is $7,000.00 to the complainant.

The bill then states that for two years prior to June 1st, 1892, that complainant was distributing and allowing to be distributed such quotations to any person whatsoever, but that after that date they desired for a time to give the public the benefit of the quotations by written licenses and permitted the Western Union and Postal Companies to gather the quotations themselves on the exchange floor and to sell and distribute them to the customers of the telegraph companies, without paying the complainant anything; but that the telegraph companies distributed the quotations to persons who used them for illegal purposes, which persons used them in gambling and betting on the fluctuations of prices on the exchange, and in "bucket shopping," contrary to the laws of the State of Missouri and of Illinois, which brought the good name of complainant into disrepute, and hurt its business, and that thereafter, they adopted rules and regulations to prevent the distribution by telegraph companies to "bucket shop" dealers, and to that end formulated regulations in the nature of a written contract to be signed by the telegraph companies, by which the companies were to agree not to give or sell the quotations to "bucket shops" or to any other telegraph company, and to pay the complainant for the quotations; but that the Western Union and Postal Telegraph Companies declined to sign the agreement, and that the complainant informed them that if they did not sign it before August 1st, 1900 (eight years after they had been thus sent out), that they would not be allowed the quotations, and the telegraph companies refusing to sign the agreement and not getting the quotations,

notified their customers that they would not furnish by wire the continuous quotations after August 1st, 1900. That from August 1st, 1900, to April 1st, 1901, the telegraph companies were not entitled to send out or distribute the quotations. That on April 1st, 1901, the Western Union Telegraph Company and the Postal Telegraph Company made and entered into an agreement with the complainant Board of Trade of the City of Chicago, which agreement is as follows, to-wit:

This Agreement, made this 15th day of April, 1901, between the Board of Trade of the City of Chicago, a corporation organized under the laws of the State of Illinois, party of the first part, and the Western Union Telegraph Company, a corporation organized under the laws of the State of New York, party of the second part, and the Postal Telegraph-Cable Company, a corporation organized under the laws of the State of New York, party of the third part.

Witnesseth: First. The said Board of Trade agrees to furnish, without discrimination or delay, to the said party of the second part, and said party of the third part, complete and continuous quotations of prices made in transactions between members of said Board of Trade in its exchange hall. Such quotations shall be received by each of said telegraph companies at its office or offices in the City of Chicago, over a wire or wires to be furnished by the said telegraph company, connecting its office or offices with Morse telegraph wire or wires in the exchange building of the said party of the first part, which shall run to and be connected with the Morse telegraph transmitting instrument upon the floor of said exchange; such transmitting instrument to be the only instrument by which such quotations are to be transmitted from the said exchange hall. Said market quotations shall be collected in the different parts of said exchange hall, and be brought to the Morse telegraph operator at said transmitting instrument with as much speed, efficiency and completeness as they were prior to June 22, 1900, collected by the said parties of the second and third parts and shall be transmitted by said operator with the same diligence, promptness and completeness as the same were prior to June 22, 1900, transmitted by the said parties of the second and third parts; the operator, Morse telegraph transmitting instrument and wires

leading to the various telegraph companies, parties hereto, to be located at the wheat pit, and within reach of the wheat reporter, said operator to be satisfactory to the telegraph companies. The said party of the first part agrees to employ or cause to be employed, without expense to the party of the second or of the third part, a sufficient number of competent persons for the purpose of collecting and transmitting the said quotations of sales upon said exchange hall, including the necessary force of messengers for carrying said quotations and reports to the transmitting operator, so that the parties of the second and third part shall obtain complete and continuous quotations throughout all sessions of said Board of Trade, of the prices at which commodities dealt in on said exchange are bought and sold. The party of the first part agrees that the intention of this clause is to insure that the delivery of its quotations to the parties of the second and third parts hereto shall be simultaneous with and in the same manner as their delivery to any other telegraph company or parties to whom they may be furnished for distribution. And said Board of Trade further agrees that said telegraph companies may designate some person of good character and proper behavior to take from the blackboard in said exchange hall, as the same is posted there, all market and statistical information which is posted on said blackboard, and that such person shall have a permit to enter said exchange hall for that purpose.

Second. The said parties of the second and third parts agree that they will not knowingly furnish or sell, directly or indirectly, said continuous quotations to any person, firm or corporation conducting a bucket shop or other similar place, where such quotations are used as a basis for bets or other illegal contracts based upon the fluctuations of the prices of commodities dealt in on said Board of Trade; nor will they knowingly continue to furnish said continuous quotations to any person, firm or corporation, who shall retransmit or furnish the same to any person, firm or corporation conducting such bucket shop or other place; provided, however, that nothing in this contract shall be construed as imposing upon the said parties of the second and third parts the duty to investi-

gate and determine the character of business conducted by any person, firm or corporation, applying for or receiving such continuous quotations, but the procedure to be adopted for the purpose of determining whether any applicant for such continuous quotations, or any person, firm or corporation receiving said quotations, contemplates using them, or is using them for any of the prohibited purposes aforesaid, shall be as follows:

1. Every applicant for such continuous quotations shall sign in duplicate an application in writing as follows:

"To the ..... Telegraph Company:

We hereby apply to you for the continuous market quotations of the Chicago Board of Trade, and we represent and agree with you and with the Board of Trade of the City of Chicago, from which you, under contract, have acquired the right to distribute said quotations:

1. That our business is and shall be the business of .... and that we are not keeping or causing to be kept, and will not keep or cause to be kept, any bucket shop or any office, store or other place wherein is conducted or permitted the business of making or offering to make, contracts, agreements, trades or transactions respecting the purchase or sale or purchase and sale of any grain, provisions or other commodity or property, wherein both parties thereto or the undersigned contemplate or intend that such contracts, agreements, trades or transactions shall be, or may be closed, adjusted or settled according or with reference to the public market quotations of prices made on any board of trade or exchange upon which the commodities or securities referred to in said contracts, agreements, trades or transactions are dealt in, and without a bona fide transaction on such board of trade or exchange, or wherein both parties or the undersigned shall contemplate or intend that such contracts, agreements, trades or transactions shall be or may be deemed closed or terminated when the public market quotations of prices made on such board of trade or exchange for the articles or securities named in said contracts, agreements, trades or transactions shall reach a certain figure; and we agree that we will not use or allow anyone else to use such

quotations or any of them for any such purpose or in such bucket shop.

II. We further agree with you, and with the said Board of Trade of the City of Chicago, that said quotations are to only be received by us for our private and individual use, and that said quotations will be used only in our said business; and that we will not sell or communicate or otherwise give said continuous quotations to any news distributing company, or telegraph company, or other person or corporation, nor allow any person or corporation whatsoever to take, directly or indirectly, said continuous quotations from said office, or to make a wire connection with the instruments or wires in said office, over which we receive said quotations. But nothing herein shall preclude us from transmitting said quotations to any branch office of ours, nor to any of our correspondents, provided that before transmitting said continuous quotations to any such correspondent we first obtain in duplicate (one of which shall be at once delivered to said Board of Trade), an agreement signed by such correspondent in which said correspondent shall agree with you, and with said Board of Trade, to abide by and comply with Clauses I, II and III hereof. If the undersigned shall transmit, or permit to be transmitted said quotations to any person, firm or corporation, who shall not have first signed a correspondent's agreement as above provided, the undersigned hereby agrees that said Board of Trade may sue the person, firm or corporation, to whom said quotations are thus transmitted, to prevent the receipt or use of said quotations by said person, firm or corporation, without making the undersigned a defendant thereor to; provided the undersigned does not, in case of a partnership, all the members thereof do not, reside within the jurisdiction of the court in which said suit is brought. By "continuous quotations" in this clause II is meant quotations wherein the price of any commodity shall be quoted oftener than at intervals of ten minutes.

III. We further agree that a strict compliance with the above provisions is and shall be a condition precedent to our right to a continuance of said quotations; and agree if we shall violate either of the above provisions, then you shall have the right at once and without notice, to cut off and cease furnishing said quotations.

We further agree with you that you shall not be pecuniarily liable for the accuracy of the quotations which you may furnish under this application, nor for errors, delays or omissions in the service.

This application shall become a contract binding upon us when accepted by you."

One of such applications, so signed, shall be by the telegraph company mentioned therein at once transmitted to the party of the first part at Chicago, which shall thereupon instigate such investigation as it deems proper to determine whether such applicant desires said quotations for said prohibited purposes. Such investigation shall in the case of applications made and delivered to the party of the first part, within thirty days after the date hereof, be completed within sixty days after the date hereof; and when so received after said thirty days, said investigation shall be completed within ten days after the such receipt of said application. If said above party of the first part shall not within the time specified notify said telegraph company at its office in Chicago that, for the reasons aforesaid, said application should not be granted, then said application shall be accepted and said telegraph company may thereupon furnish said applicant said quotations; but if within said time said party of the first part shall find upon investigation and shall notify said telegraph company that said applicant wishes said quotations for any of said prohibited purposes, said telegraph company shall refuse to furnish said quotations upon said application. If legal proceedings shall thereupon or thereafter be commenced against said telegraph company on account of any delay in receiving said quotations, or such refusal to furnish quotations, said proceedings shall be defended by the party of the first part, which shall, and hereby agrees to pay all counsel and attorney's fees, costs,

charges, damages, fines, penalties and expenses which said telegraph company may be put to or may be made subject to on account of such delay or refusal; and for the purpose of securing the said telegraph company against any such loss, expenses or damages occasioned by such delay or refusal or such legal proceedings, the said telegraph companies shall at all times retain from the compensation hereafter provided the amount of such compensation for the period of six months; and to this end, the first payment provided for under this contract shall not be made until seven months after it shall go into effect, and if at any time either of the said telegraph companies shall be obliged to pay any costs, damages or expenses which shall not be refunded to it by said party of the first part on demand, then the said telegraph companies may pay from the said fund so retained the amount so paid by said telegraph company, and may then retain from the subsequently accruing instalments a sum sufficient to make good the amount so paid out from said fund for costs, damages or expenses.

2. If said Board of Trade shall at any time ascertain that any person, firm or corporation receiving said continuous quotations from the party of the second or third part, or from persons to whom either party of the second or third part furnishes said quotations, is using said quotations for the purpose of conducting the business of illegal gambling in any of the commodities dealt in on said board of trade, or is conducting a bucket shop as defined by the law of Illinois, or is violating any of the agreements contained in said application or correspondent's agreement than said Board of Trade may (1) so inform said telegraph company so furnishing said quotations and tender to said telegraph company its bond, with a surety company, in good financial standing, as surety thereon, running to said telegraph company, and in such penal sum as shall be fixed by said telegraph company, conditioned to save said telegraph company harmless from all costs and damages, including attorney's fees, that may be incurred by said telegraph company by acting upon said information and thereon withholding said quotations from such person, firm or corporation. And thereupon said telegraph company shall at once cease to furnish said quotations to such person, firm or corporation, or if a cor-

respondent, then to the person, firm or corporation whose correspondent he is; and in that event said Board of Trade shall, at its own expense, defend any suits brought against said telegraph company, by reason of its said conduct. Or if said Board of Trade shall elect not to give such bond of indemnity, then it (2) may at its own expense commence legal proceedings in a court of competent jurisdiction against such person, firm or corporation and said telegraph company to enforce this contract and determine whether such person, firm or corporation is using said quotations for such illegal purposes, or is using such quotations in conducting a bucket shop, or contrary to the terms of his, its or their agreement aforesaid; and in such suit said telegraph company shall enter its general appearance as defendant, and if in said suit or in any suit brought by any such person, firm or corporation against either or both of the telegraph companies, parties hereto, it shall be determined by injunctional order or final judgment or decree conclusive upon the parties to said suit against the right of such person, firm or corporation to have or use said quotations, then said quotation service to such person, firm or corporation, shall be discontinued by said party of the second or third part furnishing the same, and said Board of Trade shall indemnify and save said party of the second or third part harmless against any loss, damage or expenses which may result to it by reason of said discontinuance of said service.

Third. It is further agreed by the said Board of Trade that it will cause to be kept quotation records showing the fluctuations throughout the day with the specific time of said fluctuations in the same manner as said quotation records have been heretofore kept, and that said parties of the second and third parts may at all times have access to said quotation records.

Fourth. The said parties of the second and third parts hereby agree to pay said Board of Trade for said quotations and other market news, the sum of twenty-five hundred dollars per month, payable on or before the second day of each succeeding month during said which they shall receive quotations, provided that the first pay-

ment shall not be required to be made until seven months after the going into effect of this contract, in accordance with the provisions of clause two of this contract. The proportions of said amount which shall be contributed by each telegraph company to be agreed upon between themselves. Thirty days after the termination of this contract the amount of money withheld by the telegraph companies as a security fund aforesaid shall be paid by them to the party of the first part. Provided, that if there are then pending any suits or claims against either of said telegraph companies on account of its refusal to furnish or continue furnishing said quotations, then the parties of the second and third parts shall have the right to retain a sufficient amount of said fund to amply secure them against said suits and claims, and on the final adjudication or settlement of said suits and claims, the amount withheld as security therefor shall be paid by the second and third parties to the party of the first part. But if said party of the first part shall give to the parties of the second and third parts a good and sufficient bond ample to protect them against said pending suits and claims, including all costs, damages and expenses, signed by some surety company in good standing and satisfactory to the parties of the second and third parts, then said telegraph companies shall pay the balance of said fund to the first party.

Fifth. The said party of the first part shall designate to parties of the second and third parts some officer of said Board of Trade to whom said telegraph companies, or either of them, shall apply for the correction of any faulty or inefficient service in the gathering, reporting or transmission of said quotations; or for any necessary change in said service and to whom said telegraph companies, or either of them may refer in case of any dispute which may arise as to the correctness of said quotations, and to whom said telegraph companies, or either of them, may apply touching any incidental question arising on account of said quotation service.

Sixth. Said party of the first part agrees to use all reasonable efforts to protect its property right in said quotations against purloiners thereof, and said telegraph companies agree that they will

join either with said party of the first part or other telegraph company having the right to distribute said quotations, or both, as plaintiff in any suit now pending or hereafter commenced, to protect said property right in said quotations from purloiners, provided that said telegraph companies shall be saved harmless by said party of the first part from any expense, costs, attorney's fees and damages incurred in or by reason of any such suit.

Seventh. Each of said parties of the second and third parts agrees that it will, whenever requested by said party of the first part, furnish to it a list of the persons who have discontinued said continuous quotations, to the end that said party of the first part (may at all times know the names of) may at all times know the names, locations and street addresses, of all persons, firms or corporations then receiving said continuous quotations.

Eighth. It is further agreed that said telegraph companies may furnish said quotations to any other telegraph company with which either of them now have or may hereafter have any operating contract or other arrangement, provided that every such telegraph company shall first sign a contract or agreement, running to said party of the first part, to abide by and conform to clauses two, six, seven and ten of this agreement.

Ninth. And the said party of the first part hereby agrees that it has not entered into and will not enter into any contract or arrangement with any other person or company who has or may acquire the right to distribute said quotations, in which contract or arrangement the said party of the first part has agreed or shall agree to pass upon applications of persons applying for the quotation service in a shorter period than those above provided for in the second clause of this contract. And it is further agreed that in passing upon application for said quotation service presented by either of the second or third parties it will act without discrimination, as between said second or third parties, or as between either of them, and any other person or corporation sending in applications for its patrons. And whenever the said party of the

first part shall have before it at the same time applications from the same person, firm or corporation presented through two or more persons, telegraph, telephone or ticker companies, if it approves any of said applications, it shall approve them all at the same time and shall notify at the same time all of said persons or companies, through whom said applications were presented, of such approval. This shall apply either when an application is approved affirmatively or by the failure of the said party of the first part to act upon any application.

Whenever either party of the second or third parts shall obtain and deliver to the party of the first part an application for the quotation service from any person, firm or corporation, who at the time of making said application is receiving said quotations with the approval of said first party, then the party of the second or third parts may furnish said quotations on said application without waiting for an approval by the party of the first part as hereinbefore provided in other cases.

Tenth. The words "continuous quotations" wherever used in the second and seventh sections hereof, shall be construed to mean every service of quotations wherein the price of any commodity shall be quoted oftener than at intervals of ten minutes. Each of said telegraph companies agrees not to furnish said continuous quotations to any person, firm or corporation, except as provided in sections two and eight hereof, the only intent and purpose hereof being to prevent the misuse of said quotations for said unlawful purposes, or in said unlawful business, and not to discriminate between persons desiring them for other than said prohibited purposes.

Eleventh. This agreement shall be in force for one year from the date hereof and thereafter until the first party shall give to said second party and third party, or said second party and third party shall give to said first party, sixty days written notice of its or their intention to terminate the same.

In witness whereof, the parties hereto have hereunto affixed their signatures and corporate seals, the day and year first above written.

BOARD OF TRADE OF THE CITY OF CHICAGO,
(Seal) By William S. Warren, President.
Attest: GEO. F. STONE, Secretary.

THE WESTERN UNION TELEGRAPH COMPANY,
(Seal) By Thos. F. Clark, Vice-President.
Attest: A. R. BREWER, Secretary.

POSTAL TELEGRAPH-CABLE COMPANY,
(Seal) By W. H. Baker, Vice-President and General Mg'r.
Attest: CHAS. P. BRUCH, Ass't Secretary.

The bill then alleged that on the 31st of July, 1900, it made a contract with the Cleveland Telegraph Company, and the Milwaukee Telegraph Company, of like import. The bill then alleges that no other telegraph company had signed or acquired the right to sell or distribute said quotations except the Gold and Stock Telegraph Company, which was a subsidiary company of the Western Union. And the bill then stated that they were willing to make like contracts with any telegraph company desiring to have and distribute the quotations. That no person, firm or corporation is receiving the market quotations from the telegraph companies without having first signed one of the agreements in writing mentioned in the contract heretofore set forth, and that the Christie Grain & Stock Company, nor C. C. Christie, had signed any such agreement as provided in said contract or complied with it; that the complainant hoped they would do so, but that they were by connivance and surreptitiously and wrongfully receiving the quotations at Kansas City, Mo., without right, and by theft, or from persons who were authorized to have the same, without right, and were exposing the same to public view, without having signed the contract heretofore mentioned. That the conduct of the Christie Grain & Stock Company was calculated to, and in time would, destroy the value of the complainant's quotations, and that no telegraph company would pay the complainant for the same, as long as competition existed and that if any one person in the United

States could receive them without authority, then they could be furnished to "bucket shops" throughout the United States and thus destroy the complainant's rights in the property.

The bill then states that the Christie Grain & Stock Company had demanded of the Western Union Telegraph Company that it furnish to it, the Christie Grain & Stock Company, the market quotations, and had informed the telegraph company that it would not sign the application required by the contract between the telegraph companies and the Board of Trade, and that the Christie Grain & Stock Company had demanded the quotations without signing the contract, and that it insisted that the Western Union Telegraph Company, as a common carrier, was obliged to furnish the quotations to the Christie Grain & Stock Company without the signing of the contract, and had threatened the telegraph company that if it did not comply it would take steps to make it do so, and that the complainant feared that by claims and threats of the Christie Grain & Stock Company the Western Union or the Postal Telegraph Company would be induced or forced to furnish the quotations to it in violation of the agreement between the telegraph companies and the complainant, unless restrained by injunction of the Court.

The bill then alleges that it has no adequate remedy at law to protect its rights in the quotations against efforts to distribute the same, and no adequate remedy for damages, and its remedy was in equity and asked that the Christie Grain & Stock Company and C. C. Christie be enjoined from using or distributing the quotations or receiving the same from any person or telegraph company, and that the telegraph companies be enjoined from complying with any threats or demands of the grain company, or from furnishing any quotations to it or to Christie; and enjoin them from using, selling or distributing, giving away, or allowing the same to be given away, and enjoin the telegraph companies from making any contract with the Christie Grain & Stock Company or C. C. Christie for the furnishing of the quotations.

ANSWER.

The Christie Grain & Stock Company and C. C. Christie filed their joint and several answer to this bill (found pages 60 to 86 of the Record), and set up that they reserved to themselves all benefit and advantage of exceptions which might be had or taken to the manifest errors, uncertainties and other imperfections in the bill of complaint, and that the purposes of the charter were correctly stated by the complainant, as appeared in the bill, but denied that the complainant had right or authority under its charter to promote uniformity in the custom and usages of merchants, who were not members of the corporation and denied that it has power to interfere in any manner with the customs and usages of merchants throughout the country, or that it had right or authority to inculcate principles of justice and equity in trade, or interfere with trade in any manner in any transaction not conducted on the floors of the exchange or with the Board of Trade itself. And denies that it could in any manner facilitate the speedy adjustment of disputes pertaining to business not connected with the Board of Trade and its members. Or that it had authority under its charter or otherwise, to control or secure benefits of co-operation in the furtherance of its business pursuits if such purposes and regulations were contrary to the law of the land, or against public policy of the State of Illinois, or the State of Missouri, or the general government of the United States of America. Denies that it had a right to hold property as stated in the bill or that it had power to make rules or regulations, if such rules or regulations were contrary to law or against public policy, and charged that they only had authority to expel members for good and sufficient cause alone, which should not controvert the law of the land or the public policy of the State, and that it only had authority to carry on business such as is usual in the management of boards of trade, and admitted that it had no right to conduct a telegraph business, and that its charter did not impose upon it the duty of furnishing to the public or persons

the knowledge of quotations of prices made between its members in its exchange hall; and set up that before the Board was incorporated in 1859, it run a chamber of commerce substantially the same as it did thereafter, and from the time of its incorporation, the management of the exchange hall and the business of the complainant had kept pace with the increase of business in the country and for the purpose of benefiting members and the public generally, the Board of Trade had from time to time, since organization, sent out or allowed to be sent out, reports and statements of the market price of commodities dealt in on the floor of the exchange room so that the public for a large number of years, more than thirty (30), had been able to obtain and knew the market prices of such commodities. And that the growth and progress of the Board of Trade, and commercial influence had been commensurate with that of the city in which it was located; that its initiation fee was $10,000.00, and had some 2,000 members, and alleged that it maintained an exchange hall upon the floors of which, the business of its members was transacted; that the business upon the exchange floor stood in the gateway of commerce; that the members met there to buy and sell and trade by open *viva voce* bidding, and when a purchase and sale was made, memoranda thereof was taken down by both parties to the transaction. That four-fifths of the grain and provisions produced in the States and territories of the Northwest were dealt in in this market; and that the business had become so vast that it fixed the market prices of grain, bread stuffs and meats for the extensive territory tributary to Chicago, and seriously affected and largely controlled the values of the necessities of life throughout the United States and the civilized world. That from August, 1883, the complainant permitted the Western Union Telegraph Company to occupy its exchange hall to collect, transmit and send out without restriction reports of the dealings, fluctuations and changes in the markets on the board; that this information was sent throughout the country and delivered without discrimination to all persons who desired to pay for the same. That the customers of the telegraph companies and of its commercial news in quotations were scattered through-

out the land wherever the business of buying of grain and provisions was followed; that the Western Union Telegraph Company had a lease upon the Gold and Stock Telegraph Company, which latter corporation in turn had, and has, a monopoly of the telegraph instruments know as "tickers;" that telegraph circuits were established by the Western Union with Chicago and other cities in the United States by means of Morse instruments and tickers over which market information passed to every office and place of business connected with its circuit throughout the country, and were automatically registered so that every merchant or dealer provided with the instrumentality wherever he might be, was instantaneously from minute to minute, and from hour to hour, during the sessions of the board, informed of the fluctuations and changes in the market prices of grain and other products; that the Board of Trade was incorporated for the purpose of affording facilities to its own members in doing business with each other, but as to the outside world they acted as brokers and commission merchants for producers, shippers, consumers and merchants whom they represented; that the board had so used its franchises and its members so conducted its business, that it had become a vast commercial influence and fixed the market values of grains and agricultural products for a large territory, and the fluctuation in prices upon its exchange powerfully affected the market prices of the necessities of life throughout the world. That this great power and influence was owing to the vast aggregation of products which were drawn into its portals for a market and which paid tribute and tolls to its members; that the great bulk of this business, though in form of mere private and individual dealings of its members, was in reality the business of the numerous producers, consumers, merchants and shippers for and on whose behalf they dealt. That an important factor in taking this accumulation of business to its exchange, in vesting in the board the power to regulate and determine the market prices of grain, etc., was due to the fact that the complainant had admitted and invited the telegraph companies, who are *quasi* public corporations, to the floor of its exchange and permitted them to gather the market quotations, changes and fluctua-

tions of its products and send them instantaneously from the floor of the exchange by its telegraph instruments and lines to the principal cities by means of ticker circuits to the places of business of all persons desiring such information, which information was furnished to all persons without discrimination who were willing to pay for the same; that in this way, the business of the country of buying and selling agricultural products was controlled by the market values as fixed by the Board of Trade, and the business dealings in such products had been brought to conform to the method of receiving instantaneous and continuous market reports inaugurated and for years persisted in by the Board of Trade and the telegraph companies; that this market news is a species of property and that if the statistics with reference to the business of its association and the aggregate business of its members had at the start, been gathered and compiled at the expense of its members and for their sole use, it might have been private property held in trust by the board for the use of its members; but that the board did not so exercise its franchises, but admitted the telegraph companies to the floors of the exchange and permitted and encouraged them from day to day and from year to year, to gather these statistics, quotations, etc., of the dealings on the board and telegraph them immediately throughout the land to whomever would pay for such information, until the business of the country had adapted itself to these means and appliances, and the point was reached when the quotations on the board were puissant to determine the market values of the products of the country, and all persons dealing in such products could not without the knowledge and benefit of these immediate quotations, intelligently and safely so deal; and the fact that the dealings between its members were private, did not change the fact that the statistics had been charged with a public interest and that there was a duty due to the public in respect thereto; and that the quotations had become clothed with the public interest by being used in a manner to make it of public consequence and affecting the community at large; so that they must be impressed with a public trust, interest and use and be controlled by the public for the common good to the extent of the interest created in

the public; and that the right of the public was to all alike, common to all and upon equal terms. That the market information and reports are not collected by the complainant for the use of its members alone; and that complainant under the law and in justice and equity could not conduct its affairs for a long term of years as to create a standard market for agricultural products and acting in concert with the telegraph companies, build up a great system for the instantaneous and continuous indication of that market and its fluctuations, until the public and all persons dealing in the products, conform their business to this system, and until, by usage and custom of merchants thus advanced by the methods adopted by the board and telegraph companies, such instantaneous market quotations should become necessary to the successful and safe transaction of business, and until the system had become impressed and affected with the public interest, and then be allowed to discriminate between persons and parties, and say that one shall and another shall not have such information.

The bill then charged that the telegraph companies, and particularly the Western Union Telegraph Company, for more than thirty years, as public carriers and distributers of news, had been acquiring information from the producers and consumers of the country as to the crop conditions of the country and the market prices of the necessaries of life throughout the world, and caused this information to be carried into and communicated to the Board of Trade of Chicago in the first instance and the board had received and accepted it, and its members from such information acquired during the whole time, acted as commission merchants for the consumers and producers of the country in selling and buying the commodities of the country and by selling and buying property which was not their own, but which belonged to the people, and have fixed a market value and price of the necessaries of life to the people, so that the prices so fixed do not belong to the board or its members, but to producers and consumers of the commodities bought and sold. That during all this time, the public had been interested in such market prices fixed in this manner, and during all this time, the complainant had permitted its members to so act and the information of prices to be so gathered

and disseminated to the public so that the prices upon its exchange and the market information and quotations from its inception has continued to the end, coupled with the public interest, and that no person or corporation has the right to withhold from the public, information as to such transactions and prices; and that such information is not now, and never was, a subject of barter and sale to the exclusion of the rights of the public therein.

The answer then specifically denies that the Christie Grain & Stock Company was or ever had been engaged in the business of conducting a "bucket shop" or any other place wherein was conducted or permitted the pretended buying or selling of commodities, or dealing in them on margins or otherwise, without any intention of receiving or paying for the property bought, or delivering the property sold, or that it ever did or does intend to engage in any such transactions. But that it deals in commodities as fixed by the market prices of the country and with reference to all kinds of information or conditions affecting the price of commodities, and used all public information obtainable in fixing the prices.

The bill then charged that the Christie Grain & Stock Company conducted a business in Kansas City, in the State of Missouri, in accordance with the laws of the State and of the United States, and in conducting its business acted practically and substantially in all purchases and sales and contracts for future delivery and the carrying out of its transactions as do the members of the Board of Trade, the complainant, in transacting its legitimate business on the floor of the exchange room.

The bill then proceeded to set up and charge that the market quotations constituting the instantaneous and immediate continuous market quotations of the Board of Trade of the complainant, sent out over the country by the telegraph system consisted only of market quotations of the purchases or sales of commodities for future delivery and nothing else.

The answer then, by way of affirmative defense, alleged that the market quotations which the complainant was seeking by its complaint to enjoin the defendants from using, or having, are

and were, quotations made by the complainant itself, and caused and permitted to be made by it, at a place, to-wit: the exchange hall in Chicago, kept by the complainant for the purpose of making quotations by its consent and connivance in violation of the laws of the State of Illinois and of the State of Missouri, concerning "bucket shopping," and that the quotations which complainant is seeking to prevent defendants from having, are quotations which are the result of transactions in the exchange hall kept by the complainants, which transactions at said place kept and permitted to be kept by complainant, are themselves transactions resulting in the quotations which defendants are charged with using, which are themselves "bucket shop" transactions and the result of "bucket shop" transactions carried on and encouraged and fostered by the complainant, in violation of the laws of the State of Illinois, and of the State of Missouri, and inasmuch as the complainant itself has been, and is now, engaged in fostering, protecting and engaging in deals and transactions and keeping a place in which others are permitted to engage in deals and transactions which are themselves "bucket shop" transactions, and which violate the laws of the State of Illinois and of the State of Missouri, and which transactions result in market quotations which are the same market quotations that complainant is seeking to prevent the defendant from using, and for that reason the complainants have no standing in equity; and further demonstrating the defense, the answer sets up and alleges that the transactions resulting in the market quotations sought to be enjoined, are transactions conducted on the exchange floor owned, operated and maintained by the complainant from day to day and hour to hour, in which place, with the knowledge, acquiescence and connivance of the complainant, transactions in grain, etc., are had and continue to take place in which the parties to such transactions do not intend to deliver what they sell or receive what they buy, but intend, and in fact, do from time to time, settle the differences between the buying and selling prices or the selling and buying prices without any intention to deliver on either side. And wherein they close the transactions when the price reaches a certain figure without any intention to make deliveries or to re-

ceive proffered deliveries; and that such transactions so carried on and permitted by complainant are the transactions which result in the market quotations which are the same market quotations which the complainant is seeking to prohibit the defendant from using. That it is not only conducting and permitting to be conducted such place, but is engaged in the business of maintaining a clearing house for the express purpose of settling differences between the parties to such deals on the floor of its exchange without making or intending to make any deliveries or of receiving the property dealt in and in all which transactions both parties contemplate and intend to settle merely the difference between the buying and selling price; and that the complainant inaugurated and maintains a place for the purpose of enabling such parties to engage in such "bucket shop" transactions; that the statutes of the State of Illinois, where the complainant is located and where such transactions were carried on and permitted to be carried on, and which the said complainant is violating in making such quotations which it seeks to keep defendant from using, is as follows:

STATUTE OF ILLINOIS.

"That it shall be unlawful for any corporation, association, co-partnership or person to keep or cause to be kept within this state any bucket shop, office, store or other place wherein is conducted or permitted the pretended buying or selling of the shares of stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other produce, either on margins or otherwise, without any intention of receiving and paying for the property so bought, or of delivering the property so sold; or wherein is conducted or permitted the pretended buying or selling of such property on margins; or when the party buying any of such property or offering to buy the same, does not intend actually to receive the same if purchased, or to deliver the same if sold; and the keeping of all such places is hereby prohibited. Any corporation or person, whether acting individually or as a member or as an officer, agent or employe of any corporation, association or co-partnership, who shall

be guilty of violating this section shall, upon conviction thereof, be fined in any sum not less than $200 and not more than $500; and any person or persons who shall be guilty of a second offense under this statute, in addition to the penalty above described, shall, upon conviction, be imprisoned in the county jail for the period of six months, and if a corporation, shall be liable to forfeiture of its charter. And the continuance of such establishment after first conviction, shall be deemed a second offense."

"It shall not be necessary, in order to commit the offense defined in section 1 of this act, that both the buyer and the seller shall agree to do any of the acts therein prohibited, but the same crime shall be complete against any corporation, association, co-partnership or person thus pretending or offering to sell or thus pretending or offering to buy, whether the offer to sell or buy is accepted or not; and any corporation, association, co-partnership or person who shall communicate, receive, exhibit or display in any manner, any such offer to buy or sell, or any statements or quotations of the prices of any such property with a view to any such transactions as aforesaid, shall be deemed an accessory, and upon conviction thereof, shall be fined and punished the same as the principal and as provided in section one of this Act."

The answer then alleges that in the same manner and for the same reasons, complainant is making said market quotations as the result of transactions prohibited and contrary to the laws of the State of Missouri, to-wit: Sec. 2223 of the Revised Statutes of 1899, page 620.

Sec. 2223. PLACES FOR BUCKET SHOPS PROHIBITED.—It shall be unlawful for any corporation, association, co-partnership or person to keep or cause to be kept in this State any office, store or other place wherein is conducted or permitted the pretended buying or selling of the shares of stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities, either on margins or otherwise, without any intention of receiving and paying for the property so bought or of delivering the property so sold; or wherein is conducted or permitted the pretended buying or selling of such property on margins, when the party selling the same or offering to sell the same does

not have the property on hand to deliver upon such sale; or when the party buying any of such property, or offering to buy the same, does not intend actually to receive the same if purchased, or to deliver the same if sold; and the keeping of all such places is hereby prohibited. And any person, whether acting individually or as a member or as an officer, agent or employe of any corporation, association or co-partnership, who shall be guilty of violating this section, shall, upon conviction thereof, be fined in any sum not less than five hundred dollars, and not more than fifteen hundred dollars, and any person or persons who shall be guilty of a second offense under this section, in addition to the penalty above prescribed, shall, upon conviction, be imprisoned in the county jail for the period of not less than six months and not more than twelve months. (R. S., 1889, Sec. 3836.)

The answer then alleges that the complainant is keeping and causing to be kept and aiding and assisting in keeping, a place in violation of both these statutes from day to day and hour to hour, with its knowledge and consent where such transactions are carried on and permitted by the members of the board, in buying and selling grain and commodities without any intention on the part of any of the parties to make deliveries and intend to settle the difference between the buying and selling price; and that such market quotations sent out, displayed and exhibited as the result of such illegal transactions permitted by the complainant, are the same and only market quotations which the complainant is seeking to prevent defendant from using. And for that reason, the complainant itself, is and has been creating and permitted to be created, in violation of law, the very quotations which it seeks to prevent the defendants from using and for that reason, if no other, complainant in the case is without standing in a court of equity.

The answer then sets up that complainants have no right or authority to convert the quotations to the exclusion of the rights of the public, and that any sale or pretended sale made by such complainant, of such quotations is absolutely void as against the rights of any persons who may be a member of the public. That if the board should have the right to control and sell the quotations it would interfere with and impair the rights of the public,

and denies that the complainants have the right, power or authority to restrict the use of the quotations of market reports or to dictate in any manner the distribution thereof, and has no right or authority to dictate as to whom any telegraph company may sell or furnish the service to, and charges that the quotations are such a species of property, that the complainants cannot in any way under authority of any law, right or justice, *prevent the same* from being made public or in any way making them free to the public.

The answer then states that it admits the making of the agreement of April 1st, between the telegraph companies and the complainant, but alleges that such agreement is of no binding force or effect, either upon the complainant or the telegraph companies, and it is of no effect beyond fixing the fact that the Board of Trade had attempted to sell the quotations and market reports at a price which the telegraph companies agreed to pay; if in fact the board has any interest in or power to sell the market reports and quotations, which the defendants deny; that said agreement was null and void for the reason that it was contrary to public policy and contains provisions absolutely ultra vires to complainpolicy and contains provisions absolutely *ultra vires* to complainant and as to telegraph companies and the public, and then sets up that ever since the year 1892, the Board of Trade, by various devices, had attempted to create a monopoly with its members in the grain business of the country and especially that known as the commission business, and for years had attempted to devise ways and means down to this last attempt, to-wit: the agreement made between the telegraph companies, all of which previous schemes have been failures; that the agreement entered into April 1st, 1901, was to foster and maintain a monopoly in the members of the Board of Trade and to compel the telegraph companies to enter into such an agreement; that the agreement was not entered into voluntarily by the telegraph companies, but was brought about by the dictation of the complainant in refusing to comply with the law and to allow the market reports to be sent out to the public. That such act on the part of the complainant is contrary

to the law of the State of Missouri, applicable to pools, trusts and conspiracies, which is as follows, to-wit:

"That from and after the passage of this article, all arrangements, contracts, agreements or combinations between persons or corporations, or between persons or any association of persons or corporations, designed or made with a view to lessen or which tend to lessen full and free competition in the importation, manufacture or sale of any article, product or commodity in this state, and all arrangements, combinations, contracts, or agreements whereby or under the terms of which it is proposed, stipulated, provided, agreed or understood that any person, association of persons or corporations doing business in this state shall deal in, or offer for sale in this state any particular or specified article, product or commodity, and shall not, during the continuance or existence of any such arrangement, combination, contract or agreement, deal in, sell or offer for sale in this state, any competing article, product or commodity, are hereby declared to be against public policy, unlawful and void; and any person, association of persons, or corporation becoming a party to any such arrangement, contract, agreement or combination, shall be deemed and adjudged guilty of a conspiracy to defraud and be subject to the penalty provided for in this article."

"Every pool, trust, agreement, combination, confederation or understanding, conspiracy or combination entered into or created, or organized by any corporation under the laws of this or any state, or any partnership or individual or other association of persons whatsoever with any other corporation, partnership, individual, or any other person or association of persons to regulate, control, or fix the price of any article or articles of manufacture, mechanism, merchandise, commodity, convenience or repair or any product of mining of any kind or class, or any article or thing of any class or kind bought and sold, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, or to maintain said price or prices when so regulated, determined or fixed, and all agreements, combinations, confederations or conspiracies or pools made, created, entered into or organized by any corporation, partnership, individual or association of individuals to fix the amount or limit the quality of any article or thing whatsoever, or of any article of manufacture, mechanism, commodity, convenience, or repair, or any product of any class or kind of mining are hereby declared

illegal. If any two or more persons or corporations who are engaged in buying or selling any article of commerce, manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, shall enter into any pool, trust, agreement, combination, confederation, association or understanding to control or limit the trade in any such article or thing; or to limit competition in such trade by refusing to buy from or sell to any other person or corporation any such article or thing aforesaid, for the reason that such other person or corporation is not a member of, or party to such pool, trust, combination, confederation, association or understanding; or shall boycott or threaten any person or corporation, buying from or selling to any other person or corporation, who is not a member of or a party to such pool, trust, agreement, combination, confederation, association, or understanding, any such article or thing aforesaid, it shall be a violation of this article."

The answer then set up that the contract between the telegraph companies and the complainants was void and in violation and conflict with the Interstate Commerce Laws of the United States passed and adopted by the United States Congress on August 7th, 1888, and known and designated as Chapter 772, as amended.

The answer then admitted that the Christie Grain & Stock Company had not signed the contract provided for in the agreement with the telegraph companies or any correspondent's contract therein mentioned and then set up that neither the telegraph companies nor the complainant had any right nor authority to insist on any person or corporation signing such an agreement as a condition to receiving the market quotations and using them in their business and again charging that they are public property clothed with a public interest and the right to use them as he sees fit even though he might use them in violation of a criminal law. Defendants then deny that they were wrongfully or stealthfully acquiring the market reports or quotations, and deny that they were receiving in Kansas City surreptitiously or by theft, or using or exposing the same to public view as in the bill alleged. And admitted that they had made no contract with the telegraph companies. The bill then specifically denies that any authorized use of the quotations would be calculated to destroy any value of the quotations

to the complainant or that the telegraph companies would not take them; then specifically alleges that the complainant and the telegraph companies have no right, power or authority to enter into any agreement of the kind, character or description mentioned, which would prevent competition with others as to the collection and transmission of market reports. Defendants then admit that if one person within the jurisdiction of the Court be entitled to secure the quotations without restrictions, which the complainant imposes, as set forth in its bill, he may, if he desires, furnish them to all others in the United States desiring them; that the Board of Trade has no authority to dictate what people, violating any law, have the right under any other law, to receive, as members of the public, said quotations, and deny that defendant is conducting a "bucket shop," and alleges that the Board of Trade never had the exclusive right to use and disseminate the market reports, nor to control or dictate what should be done with them, or who should have access to them after they have passed into the hands of the public carriers of the country and be distributed by said public carriers throughout the country for the use and benefit of the public.

The bill then alleges that the telegraph companies have been receiving for some time the said market reports and transmitting them by telegraph from the City of Chicago, in the State of Illinois, to Kansas City, in the State of Missouri, and have been delivering the same, however, only to such parties within the State of Missouri as would sign the contract provided for in the agreement between the Board of Trade and the telegraph companies, and are delivering them in the State of Missouri to such parties as the Board of Trade directs and orders them to be delivered only, and when the Board of Trade shall order their delivery, and are sending said quotations from the State of Illinois aforesaid into the State of Missouri, only to such parties as the Board of Trade shall approve; and that the telegraph companies are now receiving said market quotations and news onto their wires and public facilities, and when received they have been, and now are, immediately possessed with a public trust, and the right of the public thereto in the hands of the companies, and they cannot be permitted to enter into any arrangement by which they can be allowed to re-

ceive them into their possession onto their public facilities and telegraph wires so as to deprive the market quotations of its public character when coming into their possession as public carriers, and using the facilities of the United States so as to discriminate, or in any manner as to justify it in refusing to give the same to the public after receiving the same, nor use the public facilities for their transmission and retain the same as the private information of the Board of Trade, or any other party that the Board of Trade might designate; and when so receiving its quotations cannot be allowed to make the same the subject of private contract, either with the Board of Trade or with themselves, and they cannot, and ought not to be allowed, under any agreement, to use the public facilities and bring such public information and quotations into the State of Missouri, or elsewhere, and be permitted to use them so as to discriminate against the citizens of this State, and to allow such parties to have and receive them, which the Board of Trade only may direct; and refuse to allow other parties to have them upon proper terms and conditions, and that such is the effect of the contract so made and entered into, and of the transactions and acts of the companies in pursuance thereof.

The answer then replies that the Christie Grain & Stock Company has formally demanded of the Western Union Telegraph Company and of the Postal Telegraph Company, the said market quotations and has notified the companies that it would not sign the application required to be signed as stated in the bill, in the contract between the telegraph companies and the Board of Trade; that it has demanded the market quotations without signing said application, and admits that it insists that the Western Union Telegraph Company is a common carrier, and is obliged to furnish said quotations to them without the signing of the application, and admit that it has threatened said telegraph company that if it did not comply, it would take steps to compel it to do so.

The answer then states and charges that the defendant has a right under the law of the land to obtain from said common carriers the said last mentioned telegraph companies, the market reports, and that neither of said telegraph companies has the right to refuse to furnish the same to defendant upon the same terms

that the telegraph companies have been furnishing them to the public generally for the last number of years, and that the telegraph companies would do the same but for the illegal contract entered into between the parties. That said contract is illegal and void, contrary to law and the public good and is no excuse for not complying with the reasonable demands of defendant.

EXCEPTIONS.

The complainant filed exceptions to this answer, which were overruled without prejudice to the complainant, and which are unnecessary to state on this appeal.

REPLY.

The reply of the complainant to the answer, was the general reply under the equity practice, maintaining its position to sustain its complaint and its right to contest the matters set up in the answer.

STATEMENT OF EVIDENTIAL FACTS.

The cause was tried upon the depositions of various witnesses, which are fully set forth in the Record. The complainant introduced in evidence the contracts made between the Board of Trade of the City of Chicago and the Western Union Telegraph Company, the Postal Telegraph Company, the Milwaukee and Cleveland Telegraph Companies, pleaded and set up in their complaint and heretofore copied in the bill.

There was introduced on the trial, a large number of exhibits, consisting of the bound volumes of the rules of the Board of Trade, one volume being dated June 19th, 1901, and another volume dated later, December 16th, 1901, both of which are sent up as original exhibits in this cause; also the annual report or record of the

proceedings of the Board of Trade, all of which are on file in this Court. There was also introduced in evidence a clearing-house sheet of the Board of Trade of the City of Chicago, one of the original blanks being attached at the back of the printed Record in this cause; a large amount of other minor exhibits which will be used on the argument are also on file in this Court; the complainant introduced in evidence, its charter, which is substantially as pleaded in the bill and is found in the front of the exhibit known as the printed rules of the board.

The testimony shows that the Board of Trade of the City of Chicago was incorporated by an act of the Legislature in 1859, and had its place of business in said city; that the Christie Grain & Stock Company was a corporation under the laws of the State of Missouri, at Kansas City, engaged in the general grain business, buying and selling grain for cash and future delivery, and was a very extensive dealer; that the Western Union and Postal Telegraph Companies are incorporated under the laws of the State of New York, and are engaged in conducting a telegraph business in all the States and Territories of the Union, having telegraph wires for telegraph news from each and every State into each and every other State; that C. C. Christie, one of the defendants, was the president of the Christie Grain & Stock Company.

While the bill alleged that the defendants were bucket shopping, there was no testimony whatever tending to show that they were, and the complainant abandoned that proposition on the hearing, and introduced no testimony whatever upon it; and there was no testimony showing or tending to show that it was engaged in anything but a legal or proper business.

The record shows that the Board of Trade from the time of its incorporation in 1859 down to the present time was conducting a board of trade in the City of Chicago, and maintaining an exchange hall, and it now has a membership of nearly 2,000; that the individual membership fee is $10,000.00; that it has a board of directors, and that Mr. Warren is its president; that the board, ever since its organization, has been maintaining a public hall in which are located what are known as "pits"; to-wit, a wheat pit, a corn pit and an oats pit, in which its members, on certain hours

of every business day, congregate in large numbers and buy and sell in these respective pits, large quantities of grain for future delivery. That these pits simply consist of a circle around which are elevated steps in which the members by yells and calls and signs with their fingers and otherwise, make known to each other what they are offering to buy or sell, and the prices at which they are offering to buy and sell; that in these pits there is no cash business of any kind done; that they are maintained solely and exclusively as places for the buying or selling of property for delivery at some future time, and never for immediate delivery; that the cash business done on the board is done around the edges of the board at little tables, where samples of wheat, corn, or oats are kept by parties having it actually for sale; no grain, however, being kept in the Board of Trade; the results from minute to minute, and hour to hour of this speculative business in the pits is taken down and reported by an operator who sits on the edge of the pit and who, in turn, hands it to an operator operating a ticker, who immediately reports it to the telegraph companies, and which is sent throughout the United States from minute to minute, continuously, as the market runs on. These offers and acceptances made by the members in the pit for future delivery constitutes solely what is known as the continuous market quotations of the Board of Trade of Chicago, and these continuous market quotations do not consist of quotations of the price of any sale of anything for cash or immediate delivery. In other words, the reports of cash transactions in Chicago constitute no part of the continuous market quotations which the complainant is seeking to enjoin the defendants from using; but is made up of reports of purely speculative future transactions; the members that assemble in the pit and deal in this future business, ever since the board was organized, have been largely engaged in the business of selling futures for customers throughout the United States, upon a commission requiring their customers to put up margins, ranging from $100 to $200 for each 10,000 bushels of stuff dealt in; and under the system and rules when the margin is exhausted, they close out the transaction and charge the customer up with the loss. If it results in a gain for their customer, they credit him

with his profit, and render to him an account of his profits, or losses, sending him a check for the difference between the buying and selling price, if there are such in his favor, and demanding a check from them for the difference, if there is such, against him.

The testimony tends to show that these market quotations have been for more than thirty years, with a few temporary interruptions, sent out and freely distributed to grain dealers, merchants, and the public generally, throughout the United States, through the instrumentality of the telegraph system, to all parties who might pay the usual charges for that service. It was shown, however, by the testimony, that it had existed prior to that, but the great fire in Chicago had destroyed any records back of thirty years ago, therefore it was impossible to get the exact date when it commenced. But for the last thirty years these quotations have been continuously, with few interruptions, for short periods, distributed and disseminated throughout the United States and the world, by the consent, permission and with the aid of the Board of Trade, and the telegraph companies have been permitted to go upon the floor of the exchange hall without price, for nearly all of this time, gathering the information and sending it broadcast throughout the country, charging parties only the usual and ordinary fee for such information, and this news, known as the continuous market quotations, has been distributed without discrimination, up to the time of making the contract in question, and without any conditions or limitations as to its use; that this has continued for such time and so that the grain markets, not only of the West and Northwest, but of the United States and of the world, have become largely affected and controlled by these quotations, and farmers, consumers, producers and grain men throughout the United States, buying, selling and dealing in commodities and bread stuffs, and the millers in the handling of flour, have become controlled by them as market quotations, and so that no person, corporation or institution engaged in or interested in the grain business or the products of grain, as well as provisions of the country, can safely deal in or handle such commodities without the knowledge of these instantaneous and continuous quotations on the Board of Trade of the City of Chicago,

and while it is true that there are other boards of trade handling grain, notably Kansas City, Minneapolis, Milwaukee, Toledo, St. Louis, New York and other cities, which boards of trade make similar market quotations, yet they are all largely or more or less affected by the market at Chicago, and by these quotations sent out from time to time, and that such has been the case for more than thirty years. Prior to making the contract in question in this case with the telegraph companies, the board had permitted the telegraph companies to obtain this information themselves from the exchange hall and send it broadcast throughout the country, and during all this time, the members of the Board of Trade have been also receiving, through the medium of the telegraph service of the United States, information sent into its hall of exchange from all the other boards of trade and markets of the world, and constant reports of supplies of grain, and movements of grain for export and sale, and using the same to acquire information as to the condition of the weather, of rains and frosts, and any and all other matters that would affect the markets of the produce of the country, and using this information acquired throughout the country with the purpose of not only keeping its members who deal in the pits posted thereon, but after condensing the information, sending the same throughout the country in turn to the public and world at large.

These members of the Board of Trade in buying and selling for future delivery in the pits have been for all this time largely representing the consumers and handlers of products of the country, and in many cases, buying and selling, perhaps for themselves and on their own account, as conditions will suggest. Under the rules of the board no party is permitted to be upon the exchange hall or buy or sell property except through these members, and any party in the United States desiring to buy or sell commodities there, must do so through the members of the board only. In short, as to the general nature, origin, effect and purpose of these transactions, we refer to the answer upon the subject, as being a complete statement of what the evidence showed to be the facts in reference thereto. The testimony further showed, as we contend, and as will appear from the portions thereof quoted in our brief upon

the subject, together with reference to pages upon which the testimony is found, that the Board of Trade during all of said time, and is yet, engaged in the business of so called bucket shopping, that is to say, that they are keeping and maintaining a place wherein, with their knowledge, consent and aid there is being permitted by members of its board, the buying and selling of property for future delivery, without any intention or purpose on the part of the parties so buying and selling in its pit and in its exchange hall, of making deliveries of the commodities sold or of receiving the commodities bought. But that so far as the dealings in the pits on the exchange are concerned, they are simply dealing in futures with the intention of settling the difference between the buying and selling price, without any intention or expectation that any of them will ever be delivered. That the Board of Trade conducts, as is shown by the testimony, a clearing house, which is a very elaborate piece of machinery, and that all members buying or selling property in the pits for future delivery, at the close of the day's business are required to make out a statement upon what is known as a clearing house sheet, upon one side of which they shall strike a balance of the total amounts that are due them from other houses and upon the other side, the total amount due from them to other houses, and strike a balance of the amount they claim and demand a check from the clearing house on the day's business, or send a check to the clearing house if the balance is against them, for the day's business. And that this striking of balances is simply the settling of the differences between the prices at which they have bought and the prices at which they have sold, during the day. That the clearing house handles all of this business for the members under the supervision of the Board of Trade, receives the checks if sent in by the members, and pays out by its check, if going to the members, simply and only the differences between the trades made during the day in the speculative business and that thus the trades are absolutely cancelled between the members and the deals closed and no deliveries whatever made of any kind or character thereon. And that this business goes on from day to day and hour to hour, and

that no cash business of any kind is included in it, or ever was at any period of its history.

The testimony shows that in this class of deals, very little is ever actually delivered; that before the delivery months roll around, these trades are all "rung up" and cancelled by a system of "rings" and cancellation, which will be hereafter described in the argument, before the delivery day arrives. And that the effort of members dealing in this speculative business is to close everything out possible, so that at the end of delivery day, their books will be clean and cancelled; it is shown by the testimony that in all of this speculative business not to exceed one to two per cent of all of the business dealt in for future delivery ever results in any deliveries. In other words, that 98 to 99 per cent of all of it is "rung up" and closed out through the clearing house scheme, without delivery and by the mere settling of differences between the selling and purchasing prices; this testimony is undisputed.

It is further shown that the continuous market quotations which the complainant is seeking to prevent the defendant from having or receiving are the quotations of these future offers to buy or sell, thus closed out without deliveries, and that such quotations are made up of no other kind or character of transactions; except that occasionally on delivery day, there may be some small amount (not over one to two per cent of the total amount dealt in) actually delivered, when the members are unable to "ring" them out and cancel them. And this is shown by the rules of the Board of Trade heretofore referred to and offered in evidence, the particular sections of which are heretofore set up and copied in the answer.

The testimony further showed that the Board of Trade at the time of the commencement of this bill had a rule which would not allow the price of any *actual transaction* to be sent out as a part of the market quotations. And that they were wholly made up of these speculative trades. This rule known as section 22, page 17 of the rules, dated June 19th, 1901, and filed as an exhibit in this case, reads as follows.

"No member shall quote by public or private wire, or otherwise, any price except such as is the first for the commodity immediately following the time indicated on the tape or such as is

thus posted on such blackboard. No member shall be permitted to use prices made in any *actual transaction* as quotations or give the same to any person other than the one making the trade."

The Statutes of the State of Illinois and of the State of Missouri, declaring these kinds of transactions carried on by the Board of Trade and its members and permitted to be conducted by the aid and connivance of the Board of Trade, to be illegal and bucket shopping, were introduced in evidence and are as heretofore set forth, in the statement of the pleadings. After the making of the contract between the Western Union and the Postal Telegraph Company and the Board of Trade, upon which they rely in the complaint, Mr. Christie, on behalf of the Christie Grain & Stock Company, went to Chicago and applied to the telegraph companies for the continuation of market quotations as he had theretofore been receiving them for years. The telegraph companies referred him to the Board of Trade; he called upon the president, Mr. Warren, and had a talk with him, together with his attorney, Mr. Robbins, in reference to getting a continuation of these quotations in his legitimate business. They declined to give them to him unless he would sign a contract, such as is provided for in the Board of Trade and telegraph companies' contract, and would agree to place his deals on the Board of Trade of Chicago. This, Mr. Christie for himself and his company, declined to do and for this reason he was refused the quotations, that is to say, the testimony shows that he was not only required to sign the contract, which is set forth in the agreement between the Board of Trade and the telegraph companies, but that the Board of Trade demanded in addition to this, that as a condition to their conceding to the telegraph company that he should have them, that he, Christie, would agree to place his business with the Board of Trade of the City of Chicago, out of which the members of the Board of Trade would have been entitled to the commission on all of the vast business that he did. Upon his refusal they declined to allow him to have them.

The testimony further shows that the telegraph companies for years prior to this time, at that time, and yet are, furnishing with the consent of the Board of Trade, quotations brought from the

State of Illinois into the State of Missouri, to grain dealers in the City of Kansas City, Missouri, and in St. Louis and elsewhere, that the contract is being enforced against citizens of this State and that they are giving the quotations only to such members in this State and elsewhere as have submitted to the terms of the agreement with the Board of Trade and the telegraph companies and who have had the approval of the Board of Trade to receive them. And that all parties in the State of Missouri to whom they are sending and delivering them have signed the contract and yielded to the Board's demand that their business must be placed exclusively through the Board of Trade of the City of Chicago.

We desire to here state that there are four other suits pending upon the same bill by the complainant; one in Omaha, Nebraska; one in Cincinnati, Ohio; one in Indianapolis, Indiana, and one at St. Louis, Missouri; and that the complainant is seeking in all of these cities by a similar bill to enjoin all parties from receiving the quotations unless they will submit to the terms of the agreement between the Board of Trade and the telegraph companies. The bill in this case was the first one filed, but was not the first one tried. The case in Cincinnati, known as the Board of Trade vs. O'Dell Commission Company, reported in the 115 Fed., 574, was the first one tried. In that case, Judge Thompson refused the injunction upon a full hearing, upon the same evidence that is before the Court in this case, solely upon the ground that the testimony showed that the complainant came into court with unclean hands and were themselves keeping a place in the City of Chicago, in violation of the laws of the State of Illinois and of the State of Ohio, in that they were conducting a bucket shop and that the quotations which they were seeking to prevent parties from having were the result of bucket shop transactions carried on by the complainant itself.

The case in Omaha has been argued before that Court, but not yet decided and probably will not be until this cause is determined in this Court.

In the Indianapolis case, Judge Baker, upon a temporary application, refused to issue the writ, but did not hand down an opinion. And the case at bar is the only one in which the complainant has been successful thus far in its temporary application.

The testimony further shows that these market quotations, as now gathered and delivered to the telegraph companies, costs the Board nothing whatever, but that on the other hand, a minor corporation, known as the Cleveland Telegraph Company, gathers them on the floor of the Exchange and delivers them to the Western Union and Postal Companies, and instead of it costing the Board of Trade anything to gather these quotations and furnish them to the telegraph companies under the contract, that as a matter of fact another corporation, the Cleveland Telegraph Company, does all of that work without cost to the Board of Trade and that as a matter of fact the Cleveland Telegraph Company, in addition to gathering them without cost to the Board of Trade, actually turns over into the treasury of the Board of Trade a percentage of its profits. This Cleveland Telegraph Company appears to be incorporated under the laws of Ohio, at Cleveland, but never did any business in that State, but operates on the Board of Trade and we were unable to ascertain from the testimony, and the record fails to show after a diligent inquiry, as to who the Cleveland Telegraph Company is, but the officers of the Board of Trade do testify that the profits of that company are turned over to the Board of Trade; and the annual report of the Board of Trade, which is filed as an exhibit here in this Court, shows as a part of its receipts, that there was turned over to it during the year 1900 on account of the market reports the sum of $2,874.75, and we charge that the testimony shows that members of the Board of Trade are in fact the owners of the Cleveland Telegraph Company and that some of the officers of the Board of Trade are the controlling officers of the Cleveland Telegraph Company. The testimony in the cause we charge, in addition to all this, fails to show that the Christie Grain & Stock Company, or C. C. Christie, posted or exhibited any of the continuous market quotations which the complainant is seeking to enjoin it from using, until after they have become publicly posted in Kansas City, Mo., and on the trial the following stipulation effecting that point was entered into between the counsel, which appears on pages 194 and 195 of the record:

"It is stipulated that at the time of the filing of this bill the defendant, the Christie Grain & Stock Company was, and ever since

has been, posting in its office in Kansas City the greater part of the continuous quotations collected upon complainant's exchange and transmitted to the telegraph companies, and it was also during said time, purchasing from the Western Union Telegraph Company, and posting the ten-minute quotations of prices upon complainant's exchange. That said continuous quotations are furnished by the Western Union Telegraph Company to at least six different grain commission men in Kansas City without objection of complainant, and that such quotations are by said commission men posted at once upon blackboards in their offices.

"Defendant, however, claims that these continuous quotations posted by it are not posted until first made public in Kansas City, which last proposition the complainant denies.

"It is further agreed that during all the period above mentioned, said defendant, Christie Grain & Stock Company, has also been posting on its blackboard, in its place of business, market quotations of prices made on the following exchanges: New York, Minneapolis, St. Louis, Kansas City, Milwaukee, Memphis, New Orleans, and also from Liverpool, London and other European markets.

"The complainant reserves the right to show that such quotations of other markets are not the continuous quotations, but only occasional quotations of prices on such markets."

On this line the testimony shows through Mr. Warren, president of the Board of Trade, that these market quotations, after having been sent out and posted on blackboards are open to the public in the City of Chicago, Cleveland, Cincinnati, St. Louis, Kansas City and other places, in different offices in said cities. The testimony further shows that nobody was receiving these quotations except such parties as had signed the contract provided for in the agreement between the Board of Trade and the telegraph companies; that these quotations, however, were publicly posted in Kansas City and publicly posted in the Board of Trade in Kansas City, immediately after they were made and were posted by grain firms in Kansas City, on their blackboards in various places in Kansas City; that the defendant got them by telephone, by messenger boys, by personal observation and sometimes by wire; there was no testimony showing or tending to show that the defendant surreptitiously acquired these market quotations and no testimony

showing or tending to show that they had not been made public throughout the country before the defendants at any time used them in its transactions at Kansas City. The testimony shows that for more than 30 years these quotations were received without discrimination and publicly used and posted throughout the United States, with the knowledge and acquiescence of the Board of Trade, and that the telegraph companies had freely distributed them for that period with an interruption of only short intervals, for the use of everybody.

The chief operator of the Western Union Telegraph Company testified that the Western Union Telegraph Company had gathered these quotations on the exchange floor and been sending them out and distributing them among the people and that he had no recollection of a time when this was not done, except a short period following 1890, and another period prior to that in 1896; except these times he states: "I have no recollection of any time when the Western Union did not furnish them to everybody who wanted them," and that the whole market price of the West is made by the fluctuations of grain on the Chicago Board of Trade for future delivery; and that nearly every purchase and sale in the West, the Northwest and the Southwest is based on the price of that property in Chicago each day."

And that it would be impossible to do any business in the country without knowing these continuous fluctuations of prices on the Board of Trade, and every witness who testified upon the subject stated that these continuous market quotations had been sent out for so long a time and under such circumstances as to affect the business of the country to such an extent that the grain markets of the United States and of the Southwest had been absolutely made and controlled by these prevailing prices in Chicago, both on and off various Boards of Trade located in the West, Northwest and Southwest, and that prices of grain go up and down on the markets of Kansas City, St. Louis, Minneapolis and elsewhere as these fluctuations in Chicago go up and down. That nearly all of the trades in the pits on the Board of Trade for future dealing and out of which the quotations grow, emanated from deals originating or culminating in what is known as "rings," "stop or-

ders," "hedges," "transfer trades," "spreads," "direct settlements" and "scalping."

That "rings" were a system by which one party having bought or sold for future delivery in the pits to some other party, and such other party having sold to a third party, and the third party to a fourth party, and so on, without limit, until it reached the party who originally started it, and thus all of the transactions were wiped out and "rung up" or cancelled, nothing delivered and a settlement only on differences between the parties.

That "stop orders" was a system by which customers and dealers throughout the country, telegraph orders to members of the Board of Trade at Chicago, or give them orally to them, to buy or sell a certain quantity of grain for future delivery, fixing upon it a stop or limit, at which they desire it closed, if it goes against them, or sold if it goes in their favor, and that mere differences in the prices were settled between them and no deliveries made.

That "hedges" was a system practiced by dealers in grain, that is, parties who would actually buy stuff throughout the United States or in the country; and by millers who would buy grain for grinding into wheat or meal, would after having bought the stuff in the country, go on the Board of Trade and sell against it so as to protect themselves from loss, and in the case of millers, when it was ground into flour and their flour disposed of, they would go into the market through the members of the Board of Trade and buy in the future what they had sold and thus cancel the difference between the buying and selling price; and that the grain men handling actual grain would sell against it on the Board of Trade of Chicago, and after selling their actual grain in the markets of the country or exporting it, would go on the Board of Trade through its members, and buy in their speculative sale of grain and settle the difference between what they sold it for in the pit and what they bought it in for in the pit.

That "transfer trades" were trades by which brokers, members of the board, would go into the pit and buy or sell, articles for future delivery, and afterwards transfer or assign their deals

to somebody else, and get out themselves entirely, settling on the differences and making no deliveries.

That "spreads" were deals by which a party would buy grain for future delivery in one market, say in St. Louis or Kansas City, and sell the same article in the same amount on the Board of Trade of Chicago, taking the chance that the difference between the two markets might enable them to close it out with a profit; and that they would then reverse the transaction and sell in the market bought in and buy in the market sold in, so that they would get a profit of the difference between any further spread or widening of the prices in the two markets they closed it out; and that no deliveries were ever made or contemplated on these transactions.

That "direct settlements" were a class of settlements where two or more brokers would have a deal on the Board of Trade in futures and would simply agree among themselves to settle the deal and cancel it and pay each other the difference without any deliveries.

That "scalping" was a system by which a man of limited means and without money or with small amounts, would go each day on the Board of Trade, being a member of it, and buy or sell grain and close it out the same day, on taking a small profit or assuming a small loss, pay the difference and go home at night with the business absolutely closed up, having his profit or pocketing (?) his loss.

The particular testimony bearing upon these transactions will be referred to by page of the Record in the argument.

There will be found in the report of the Chicago Board of Trade introduced in evidence and filed as an exhibit in this case, the compiled information as to the quantity of grain produced in the country and in the various States, and of the amount handled through this future dealing system on the Board of Trade, which is specifically set out in the argument; bearing upon the question of the impossibility of any intention of the members to make deliveries upon any of the transactions.

We give the above as a condensed statement of the situation and such other matters as bear upon the case will be aptly referred to from the Record in the argument.

ASSIGNMENT OF ERRORS.

The assignment of errors, though copied in the Record, are now again referred to for convenience, as follows:

ASSIGNMENT OF ERRORS.

Come now the defendants and file the following assignment of errors to the judgment of the trial Court, and upon which they will rely for grounds of reversal on appeal in the above entitled cause.

I.

The Court erred in holding and decreeing that the complainant was entitled to any relief in this cause.

II.

The Court erred in holding and finding that the complainant in this cause had any sufficient or substantial interests in the subject of the controversy sufficient to justify any relief in equity, and erred in refusing to hold that the complainant had no interest sufficient to justify any relief in the cause.

III.

The Court erred in holding and finding and was in error in permitting complainant to have any relief because there was no testimony of any kind showing or tending to show or which justified a holding or finding that the defendants were using or posting any of the quotations mentioned in the bill of complainant, until after they were first made public.

IV.

The Court erred in its decree and judgment in that under the undisputed evidence, the contract pleaded in the bill entered into between the Board of Trade and the Telegraph Companies was void and was an unjust discrimination against the rights of the defendants and the public, and in not holding that said contract was beyond the power of the Board of Trade to make, and that it was beyond their power to undertake to sell the quotations to the telegraph companies and to bind the telegraph companies to discriminate and to submit to the Board of Trade the question as to who should or should not receive the same, for the reason that the market quotations were impressed with a public trust and were not the subject of barter or sale between the Board of Trade and the telegraph companies, and that even if they were the subject thereof, the contract was void as being an unjust discrimination against the defendants and the public as to who should or should not receive the market quotations and was an unjust regulation against the defendants and the public, and beyond the power of the companies contracting thereto.

V.

The Court erred in granting the complainant any relief for the reason that said contract between the Board of Trade and the telegraph companies, set up and pleaded in the bill, pertained to and attempt to affect the question of interstate commercial relations and to affect the matter of interstate commerce, and as such and for that reason, it placed and attempted to place even if otherwise valid, an unjust and unwarranted limitation and embargo upon interstate commerce and was in direct conflict and violation of Section 8 of Article 1, of the Constitution of the United States.

VI.

That said contract between the Board of Trade and the telegraph companies pleaded in the bill, was void and the Court erred

in holding that the complainants were entitled to any relief thereunder for the further reason that said contract was wholly beyond the power and authority of the Board of Trade or Telegraph Companies to enter into, for the reason that the same was an attempt to enter into a private contract pertaining to a subject and subject matter in restraint of contracts, and the free right to contract and in restraint of interstate commerce, in violation of said provisions of the Constitution above cited.

VII.

That the Court erred in giving the complainant any relief because the contract made and entered into between the Board of Trade and the telegraph companies, pleaded in the bill, and upon which the right of the complainant was founded, was void and beyond the power of said parties to contract concerning, for the reason that the same violates the anti-trust act of Congress, passed July 2nd, 1890, found in Volume 26, United States Statutes at large, Page 209, Chapter 647, and as enunciated in the case of Addyston Pipe & Steel Co. vs. U. S., in the 175th volume of the United States Supreme Court Reports, page 211, in that it was an attempt on the part of the parties thereto, to attempt to enter into private contract to limit, discriminate and control, as against the defendants and the public at large, the free and unlimited right to engage in interstate commerce and in interstate transactions, and to have and receive information in the state of Missouri and was an attempt on the part of the contracting parties thereto, to control a subject of interstate regulation and interstate commerce, to the exclusive use and benefit of the complainant.

VIII.

The Court erred in holding that the complainant was entitled to any relief for the reason that the contract made and entered into between said complainant and the telegraph companies was void in that it undertook and prohibited the defendants and the public from receiving and having the market quotations upon the pay-

ing of reasonable charges therefor, and upon such terms as other parties like situated were receiving the same.

IX.

The Court erred in rendering a decree for the complainants because the said contract between the Board of Trade and the telegraph companies was *ultra vires*, and wholly beyond the authority or right of the parties to enter into, and was an attempt to control a subject of interstate commerce, and a subject in which the defendants and the public had an interest and a right.

X.

The Court erred in granting the complainant relief for the reason that the contract between the Board of Trade and telegraph companies declared upon in the bill, attempts to and does discriminate against who shall or shall not receive the market quotations brought into the state of Missouri over the public facilities, to-wit: over the telegraph lines, so long as the testimony shows that they were distributing to the public generally.

XI.

The Court erred in granting to the complainant any relief because the contract made and entered into between the Board of Trade and the telegraph companies undertakes to contract with reference to market quotations which are public property and is an attempt on the part of the Board of Trade and the telegraph companies to unjustly discriminate against the public and against the grain dealers of the country, and is a written and avowed declaration and purpose on the part of the Board of Trade to control the entire grain market of the country, and to prevent any and all persons from using or having the quotations of the grain markets unless such persons should either be a member of the Board of Trade of Chicago, or agree to trade through and by its members only. And if sustained and enforced, places in the power

of the Board of Trade, the complainant, to prevent any person or persons in the United States from having or receiving the market quotations, or knowing the condition of the public market, unless such parties pay tribute to the Board of Trade or its members.

XII.

The Court erred in finding for the complainant for the reason that the evidence and record shows that the Board of Trade, the complainant, upon application of the defendants, refused to allow them to receive the market quotations unless the defendants would agree to place its deals and trade through the members of the Board of Trade, the complainant, and for that reason, also, the object and purpose of the contract was shown to be leveled against competition and is a contract permitting unjust discrimination.

XIII.

The Court erred in its finding and decree and in the opinion rendered upon which the decree is founded in that the market quotations which the complainant sought by the bill to prevent the defendants from using or having, were market quotations made under such circumstances and continued for so many years to be used without limitation by the public, that the same had become impressed with a public right, and a part of the community property of the country at large, and in holding and decreeing that the complainant was entitled to any exclusive property right therein as against the defendants and the public.

XIV.

The Court erred in finding for the complainant and entering the decree for the further reason that the testimony in the cause shows that the market quotations had been put into the channels of commerce for more than thirty years, and placed in the hands of the public without limitation, so that the business of the country had been accommodated to and the grain relations of the coun-

try were regulated thereby, so that the same had become a part of the public property and impressed with a quasi-public trust, and hence, were not subject to control, discrimination or limitation, by the complainant or the telegraph companies, and therefore were not the subject of control by either of said companies and in decreeing that the complainants were entitled to any relief with reference to the limitation or qualification concerning the same, and in enjoining the defendants from the reasonable use thereof, as a part of the public.

XV.

The Court erred in entering the decree for the complainant for the reason that the testimony shows that said market quotations were impressed with a quasi-public trust and were brought into the state of Missouri and distributed to numerous other parties, residents of said state, and when brought into the state, they were within the control of the Courts, enforcing obligations of common carriers, and public rights, without discrimination, and when so brought into the state, the defendants were entitled to the use thereof upon paying the telegraph company its reasonable charges therefor, and any attempt on the part of the Board of Trade or the telegraph companies to control the same for the exclusive use or benefit of parties that the complainant, the Board of Trade, might direct, was wholly beyond the authority of either of said corporations, and therefore complainant was entitled to no relief.

XVI.

The Court erred in its judgment, decree and opinion, in holding that the market quotations could not be the subject of control by the Courts until the legislature had manifested its intention to make them public property, for the reason that the public right always existed therein, and the right to enforce the right of the public and of the defendants thereto, exists in the courts independent of any action of the legislature.

XVII.

The Court erred in not holding, decreeing and finding that said market quotations were property impressed with a public trust and right and in its judgment and decree, in giving to the complainant, the right of discrimination and exclusive control pertaining thereto.

XVIII.

The Court erred in its decree, judgment and finding because said market quotations were impressed with a public right, and that the Board of Trade could not deprive the public of their right thereto, and in not holding and finding that the public and the defendants had a right to receive the same upon paying reasonable charges of the telegraph company for transmitting the same.

XIX.

The Court erred in its judgment and decree for the reason that the testimony did not show that the defendants were engaged in bucket-shopping, or violating the laws pertaining to bucket shops, and such being the fact, even if the Board of Trade and the telegraph companies had the right to contract pertaining thereto, the defendants were such parties as were entitled to the quotations in any event, notwithstanding they had refused to sign the contract and application provided for in the agreement between the Board of Trade and the telegraph companies, and being such parties, the court erred in its order restraining the defendants from the use of the same.

XX.

The Court erred in rendering a decree for the complainants because under the evidence in the cause complainant was entitled to no relief in equity for the reason that they come into court with unclean hands in that the quotations which complainants sought to restrain and prohibit the defendants from having or using, were

quotations made and permitted to be made and brought into existence at a place kept, maintained and fostered by the complainant, in violation of the statutory laws of the state of Illinois, and of the state of Missouri, and the complainant coming into court under such circumstances had no rights in the quotations which a court of equity should enforce.

XXI.

The Court erred in rendering the decree for the reason that the judgment and decree of the Court goes entirely beyond and is not within the issues under the pleadings, in that it undertakes to and does not only prohibit the defendants from using or having the quotations for use in its business, but prohibits the defendants from even knowing or getting information pertaining to the market quotations and prohibits and enjoins them from having or possessing knowledge however received, and that it prohibits the defendants from allowing quotations with reference or pertaining to the Chicago market on the floor of the exchange, from passing over its wires, even though not used or offered or claimed to be used by defendants for the purpose of trading or dealing with its patrons or customers. And in that said decree prohibits the defendants from knowing or being advised of market quotations passing over their wires, or having information of what passes over their wires pertaining to quotations, even though they should never use or offer to use the same.

XXII.

The Court erred in not dismissing the complainant's bill for want of equity.

XXIII.

The Court erred in not dismissing the complainant's bill and in entering the decree in favor of defendants, because said bill was wholly insufficient in equity to entitle it to any relief.

XXIV.

The Court erred because under all the evidence in the cause the same presented no equity or cause for equitable interference.

XXV.

The judgment and decree of the Court is erroneous because it is wholly unsustained by the testimony and is against the evidence and the weight of the evidence.

XXVI.

The Court erred in rendering its decree for the complainant because the undisputed evidence showed that the Board of Trade had wholly exceeded its power and authority under its corporation charter, in that its attempt to sell or traffic in market quotations with the telegraph companies was wholly foreign to the purpose of its incorporation, and for that reason its acts in entering into the contracts with the telegraph companies were *ultra vires*.

SPECIFICATION OF POINTS OF ERROR RELIED UPON AND FOR DISCUSSION HERE.

I.

That the finding and decree of the Court was erroneous and should have been for the defendants because the contract made and entered into between the Board of Trade and the telegraph companies as against the defendants in this case and other citizens of the State of Missouri, was void and beyond the power of the parties to make and in violation of the Anti-trust Act of Congress, passed July 2nd, 1890, found in Vol. 26, U. S. Statutes at large, page 209, chapter 647. As interpreted and enunciated by the decision of the Supreme Court of the United States in the 75 U. S. Rep., page 211, Addyston Pipe & Steel Company vs. United States,

in that it was an attempt on the part of the Board of Trade and the telegraph companies to enter into a private contract to limit, discriminate and control as against the defendants and the public at large, and particularly the citizens of the State of Missouri, of the free and unlimited right to engage in interstate commerce and interstate transactions, and was an attempt on the part of the contracting parties to control the subject of interstate regulation and interstate commerce as against the citizens of the State of Missouri and other States than the State of Illinois, to the exclusive use and benefit of the complainant.

II.

That the Court erred for the reason that the contract made and entered into between the Board of Trade and the telegraph companies was an attempt to discriminate against the citizens and the commercial interests of the country unjustly as to who should and who should not have and receive the market quotations upon paying reasonable charges therefor, and if carried into effect tends to, and does monopolize and concentrate in the hands of the Board of Trade the right to control and affect the public necessities, breadstuffs and provisions of the country and build up in the complainant a monopoly therein; and to build up in the hands of the complainant the exclusive right to buy and sell commodities for future delivery and to compel the citizens of other States to pay tribute to members of that institution, and place the exclusive business with them, and preventing other parties like situated from engaging in lawful pursuits; and is an illegal restraint upon free and unlimited trade in public information and property of the public.

III.

That the Court erred in granting relief to the plaintiff for the reason that the result of sustaining its contention would be to regulate interstate commerce relations and matter of interstate commerce, and an unjust and unwarranted limitation and embargo

on interstate commerce in direct violation of Sec. 8 of Art. I of the Constitution of the United States.

IV.

The Court erred in sustaining the plaintiff's complaint because the continuous market quotations were impressed with a public right and was a subject of information held in the nature of a quasi public trust, and that neither the Board of Trade nor the telegraph companies could enter into any contract to limit the information or discriminate against the public or seek to make the public matter a subject of private and exclusive barter and sale, or confine the same to the exclusive and private interests of the Board of Trade or the telegraph companies; and that such market quotations were of such public character as that they could not be taken away from the public or limited, so long as the Board of Trade continued in such business, and the telegraph companies communicated the information, and as a result placed in the power of the Board of Trade the arbitrary right to prevent any person or persons in the United States from having or receiving the continuous market quotations, or knowing the condition of the public market, unless such parties should pay tribute to the members of that board; and that the contract between the Board of Trade and the telegraph companies was an unjust limitation against competition in a legal line of business.

V.

That the decree was erroneous for the further reason that the telegraph companies, as public carriers, could not be permitted to receive onto its wires in the State of Illinois this public information and transmit the same into the State of Missouri, and there discriminate as to who should and who should not receive the same, upon paying the reasonable charges therefor.

VI.

That the decree was erroneous for the reason that the indisputed evidence disclosed that the market quotations, which the complainant was seeking to prevent the defendants from using or having, were permitted to be made by the Board of Trade with its consent, or connivance, and under its directions, at a place kept and conducted by the complainant, as a result and accruing from transactions that were illegal and in violation of the State of Illinois and of the State of Missouri, against bucket shopping; and that the complainant comes into Court with unclean hands, and that in equity the bill should have been dismissed for that reason alone.

VII.

That the decree was erroneous and should have been for the defendants because the testimony wholly failed to show that the defendants were receiving or using the continuous market quotations after they were first made public throughout the country, even if the contract between the Board of Trade and the telegraph companies was legal.

VIII.

That the Court erred because the undisputed evidence showed that the defendants were not engaged in bucket shopping, but in a legal business, and even if contract between Board of Trade and telegraph companies was valid, that the defendants were such parties as were not prohibited from receiving the quotations, regardless of the question, whether they signed the application provided in the contract between the Board of Trade and the telegraph companies or not, and that a court of equity could not enjoin the defendants from receiving the quotations when the testimony showed that they were such parties as would have been entitled to receive them in any event.

IX.

That under the evidence, if the contract between the Board of Trade and the telegraph companies was valid, the complainant has no standing in equity for the reason that it has no interest whatever in the subject of the controversy.

X.

That the decree was erroneous for the further reason that the bill of complainant was predicated upon the prime proposition, that it had an equity and interest in the controversy, upon the theory therein charged that the defendants were violating the law in engaging in bucket shopping, thus injuring and damaging the complainant, and the evidence failing to show that the defendants were engaged in such business, the basic proposition upon which the bill was planted wholly vanishes.

XI.

That the contract made and entered into between the Board of Trade and the telegraph companies was *ultra vires* the corporation, to-wit: the Board of Trade, for the reason that under its incorporation and the objects and purposes thereof, it was wholly beyond its authority or power to enter upon the field of pecuniary speculation and financial enrichment, and beyond their power to sell the public market quotations for its pecuniary gain and profit, even if same were the subject of private conversion or sale.

XII.

That the decree was erroneous for the reason that the undisputed testimony shows that the object and purpose of the contract between the Board of Trade and the telegraph companies was to place the matter of who should and who should not receive the quotations wholly in the power of the Board of Trade, and that such exercise of power would and did so operate as to result

in the ulterior purpose of making all the parties place their deals through members of the Board of Trade as a condition of trading at all.

BRIEF AND ARGUMENT.

The first proposition that we desire to discuss arises at the threshold of this case, and that is that the contract of April 1st, 1901, made between the Board of Trade and the Western Union Telegraph Company, the Postal Telegraph Company and all other subsidiary telegraph companies, is void and gives the plaintiff no right or standing in equity, for the reason that the same is in violation of the Act of Congress of July 2nd, 1890, found in volume 26, U. S. Statutes at large, page 290, chapter 647, being also found in volume 1, supplement of the Revised Statutes of the United States, second edition, 1874-1891, at pages 762-763, which, among other things, reads:

Sec. 1: "Every contract, or combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or of foreign nations, is hereby declared to be illegal."

"Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not exceeding $5,000.00, or by imprisonment not exceeding one year, or by both such punishments, in the discretion of the Court."

Sec. 2: "Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations shall be deemed guilty of a misdemeanor and on conviction thereof, shall be punished by a fine not exceeding $5,000.00, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the Court."

Sec. 3: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in any Territory of the United States, or the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any

State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared to be illegal."

* * * * *

Sec. 7: "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor, in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including attorney's fees.

Sec. 8: "That the word person or persons wherever used in this act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

In light of this provision of Congress, let us now examine the contract, its nature, effect and results. This agreement is made by the Board of Trade of the first part, and the Western Union Telegraph Company of the second part, and the Postal Telegraph Company of the third part. This contract provides that the Board of Trade shall furnish simultaneously continuous quotations of prices made in transactions in the Board of Trade exchange hall, over wires to be furnished by the companies, and also that the telegraph companies shall be furnished other statistical information, which is from time to time posted on the blackboard in the exchange hall. The telegraph companies shall not furnish them to any bucket shop or any place where they are used as a basis for illegal contracts, and will not furnish them to any party who shall retransmit them, but it is distinctly stated that the telegraph companies shall not be bound to investigate as to who the parties are or for what purpose they are using them; and then provides how that subject shall be arrived at by providing that every applicant shall sign an application to the telegraph companies, which application addressed to the telegraph company by the party desiring to receive the quotations, must first recognize that the telegraph companies have acquired the exclusive right to distribute the quotations from the Board of Trade; and the applicant is required

to state that he is not and will not keep any bucket shop, office, store, or other place wherein is permitted the making or offering to make contracts respecting grain and provisions or other commodities, wherein, first, both parties thereto or the applicant intend that the deals may be closed or settled according or with reference to public market quotations or prices made on *any board of trade or exchange* upon which the commodities are dealt in, and without a bona fide transaction on such board. Second, or wherein both parties to the transaction shall contemplate or intend that the transactions may be closed or terminated when the market quotations made on such Board of Trade reach a certain figure. Third, that the applicant must agree that he is to receive them for his private and individual use, and will not communicate them to anyone else, except the applicant's correspondent, and then that they will require the correspondent to sign an agreement by which the correspondent shall also agree with the Board of Trade to abide by and comply with the provisions of the contract that the applicant makes. The applicant agreeing that the Board of Trade may sue his correspondent to prevent the use of the quotations; the applicant to further agree that if he violates the provisions of the contract, then he shall at once be cut off from said quotations; the contract then provides that when this application is signed, it shall be turned over by the telegraph companies to the Board of Trade, who shall thereupon instigate such investigations as it deems proper, to determine whether the said applicant desires said quotations for prohibited purposes; and if within a certain time the Board of Trade should not notify the company, that then they might furnish the quotations, but if within that limited time, the Board of Trade should find and notify the company that the applicant wishes the quotations for any of the prohibited purposes, the telegraph company should refuse to furnish them, and then if parties should sue the telegraph companies for refusing to furnish them, the Board of Trade should defend all the suits and pay counsel fees and damages and charges and fines and penalties, which the board might be put to; and then provides that if the board should, at any time after these contracts should be signed by parties, and after receiving the quota-

tions from the telegraph companies, find that the applicants are using them for the purposes of illegal gambling or in conducting a "bucket shop" as defined by the laws of the State of Illinois, or violating any of the agreements as contained in the applicant's or correspondent's agreement, then they might indemnify the telegraph companies and hold them harmless in acting upon the Board of Trade's information in withholding the quotations from the applicants. And upon the Board of Trade notifying them that in their opinion, the applicant was violating the contract, the telegraph companies should cease to furnish the quotations; then the Board of Trade at its own expense would defend any such suits, or if the Board of Trade elected to indemnify the company in the action carried on in the name of the telegraph company, that each of the companies were to pay the sum of $2,500.00 per month for the quotations.

Then follows a provision that the corporations to the contract should join in a common purpose of preventing purloiners from getting the quotations. It further provides that the telegraph companies shall furnish the board a list of the parties from time to time who were discontinuing the quotations, so that the Board of Trade may know who are the parties that are receiving them. Then the Board of Trade agrees that it will not make any contract with any other person or company who has acquired the right to distribute the quotations, for furnishing them upon any other or different terms than the one in question. Then follows a provision that the Board of Trade, in passing upon applications for quotations presented by the telegraph companies, will "act without discrimination as between the second and third parties, or as between either of them;" and the other person or corporation sending in applications and the telegraph companies agree not to furnish these quotations to anybody except as in the contract provided. It being stated in the contract that the purpose is only to prevent the misuse of said quotations for unlawful purposes or in unlawful business, and "not to discriminate between persons desiring them for other than said prohibited purposes."

It will be seen that this contract, upon its face, while pretending to limit the quotations for use to parties who should use

them for illegal purposes, the Board of Trade is made the sole and exclusive judge as to who are such parties. They are to pass upon that question themselves, and whether right or wrong, their decision is conclusive; and even though the parties may be parties using them for lawful purposes, yet if the Board of Trade decides that they shall not have them, they cannot get them, no matter how lawful their business may be, and the purpose of that contract as demonstrated from the testimony, was to allow the Board of Trade to pass upon the proposition, so that no party would be entitled to receive them, unless he placed his deals with members of the Board of Trade. The question as to whether or not the party was using them for illegal purposes is shown to be purely a subterfuge and an apparent excuse for making a contract which would permit them to exclude the public from having them, even though they were using them for legal purposes, because the power is left in the Board of Trade to determine for itself who are and who are not proper parties to have them, and that power regulating the subject, is left solely and exclusively to their arbitrary determination, right or wrong, and to this the telegraph companies yield.

The testimony shows that when Mr. Christie applied for these quotations, that the Board of Trade not only required him to sign the contract, but even then informed him that he could not have the quotations, unless he placed his deals through members of the Board of Trade. This appears at page 528 of the Record, where Mr. Christie states that when he applied for these quotations, he had a conversation with Mr. Warren, the president of the board, and Mr. Robbins, the attorney for that corporation, and in reference to that conversation, when he asked for the quotations, the following occurred:

A. "Mr. Robbins (attorney for the board), Mr. Warren (president of the board), and myself, and it resulted in their refusing to give me the quotations unless I would agree that every order I got, I would place on the Board of Trade. That I would not agree to."

Therefore, we insist that the contract made between the Board of Trade and the telegraph companies is void, under this Act of

Congress, for two reasons: First, upon its face it is a contract in restraint of trade or commerce among the citizens of different States, and an attempt to monopolize and combine against persons in trade or commerce, residents of different States; and, second, beyond the face of the contract, and by the attitude of the board in exercising their power thereunder, its result and effect is shown to result in restraint of trade between the citizens of the several States, and the creation of a monopoly in restraint of trade or commerce against and between citizens of different States. For the purposes of this discussion, it is wholly immaterial to consider whether the market quotations were or were not public property, or whether they are or are not private property of the Board of Trade; even conceding for the purposes of this argument (which we further on deny), that it is the private property of the Board of Trade, still, under this Act of Congress they cannot make or enter into any agreement of any kind which undertakes to contract concerning, affect, regulate or place an embargo or restriction upon, any of the market quotations sent out through the country, and in which it is dealing for a profit, as against citizens of the State of Missouri, or citizens of any other State, than the State of Illinois. It stands proven that this contract is a restriction and a restraint upon trade. It stands further proven that its effect and working according to the purpose and object of the Board of Trade in requiring all parties to place their trades with them, makes it a restraint, a regulation and an attempt to monopolize a subject of interstate commerce and commercial trade as to citizens of the State of Missouri or any other State than the State of Illinois, as against the Act of Congress heretofore referred to.

It is conclusively shown on the face of the contract and established as well in its operation, as admitted by the president in his conversation with Mr. Christie, that it attempts to and does create a monopoly in restraint of trade and commerce between citizens of other States. Under this Act of Congress it becomes wholly immaterial even to inquire whether parties are damaged by such contract or regulation of trade. Under this act, no party has a right to make or enter into any contract at all which attempts to directly affect the subject of interstate commerce as against the

citizens of the several States. It does not even require the contracts to be vicious in themselves. The Act of Congress is an absolute inhibition upon their power to make any contract whatever which in any way materially restrains or effects matters of interstate commerce, or create any kind of a monopoly, no matter how innocent the purpose may be on the part of the parties who make it. And no matter what may be their object or purpose, it is no justification under the Act of Congress for these corporations to enter into this contract affecting, or monopolizing, or regulating the subject of interstate commerce between the citizens of the several States, that their object and purpose may be to carry on a code of morals after their own liking, even if such was its real purpose.

It is no concern of the Board of Trade so far as interstate commerce propositions are concerned, as to how, or for what purpose, any parties in the other States after lawfully being entitled to the free unrestrained right to deal in public property, that they may afterwards in their own States, use it for an illegal or improper purpose. The Act of Congress is not dealing with the question in any such light. If parties in the several States are entitled to the free and unrestrained right to handle a subject of interstate commerce, no person or corporation in any one State can make an agreement which controls, restrains or creates a combination or monopoly in violation of this statute and then undertake to justify their own illegal purpose by declaring that they are justified in their illegal agreement for fear some other person in the other States may use the subject of the contract for improper purposes after having received them.

But in addition to this, defendants in this case, citizens of the State of Missouri, are conceded by this Record to be engaged in lawful business, and it is not intimated in the evidence that they are engaged in any of the business which the unlawful contract of the telegraph companies and the Board of Trade designates as "bucket shopping," or illegal transactions. Hence, this contract is absolutely void as against these defendants, and the complainants are in Court asserting rights against them, and in their bill, in the teeth of and against the provisions of the Act of Congress

referred to. And the complainant, in the prayer and concluding part of its bill, complains against the defendant that they would not sign this contract or make this application as provided for therein, and states that the defendants have demanded the quotations without signing their contract, and that the complainant fears that the telegraph companies will furnish them to the defendant without requiring the defendants to sign the contract unless restrained by injunction of the Court. And that inasmuch as the defendants have not signed the contract, they should be enjoined from having them, and the telegraph companies from allowing them to have them. And not only this, but the decree of the Court orders and adjudges that the defendants be restrained from having the quotations until they shall first acquire the right to receive the quotations by contract or purchase from the complainant or such telegraph companies as shall lawfully acquire from the complainant the right to sell and distribute said market quotations.

The object of the bill is to compel the defendants to enter into this arrangement and the injunction decree of the Court was that they should not be entitled to them until they had signed or entered into this arrangement with the complainant or the telegraph companies, provided for in this contract between the Board of Trade and the telegraph companies, which we insist was utterly void and in violation of the Act of Congress.

This decree and its enforcement, in our judgment, was squarely against this provision of Congress, and was in effect requiring the complainants to enter into this illegal arrangement and abide by it, even though under the undisputed testimony, such an arrangement as construed by the Board of Trade and its president, when the defendant made the application for the quotations, was in addition to all this, that he must kneel down and turn all of his business over to members of the Board of Trade in addition to signing the contract. This Act of Congress, its construction and effect, has been recently before the Supreme Court of the United States:

75 U. S. 211, *Addyston Pipe & Steel Company vs. U. S.*
(Being Vol. 20, Sup. Ct. Rep. 96.)

This case is decisive of the proposition presented here. In that case, it was shown that the defendants had entered into an agreement by which they would not compete between themselves in any of the States or Territories mentioned in the agreement in regard to the manufacture and sale of cast iron pipe, and that since the agreement, the defendants had operated their shops and been selling and shipping their pipe into other States and Territories under contracts for the manufacture and sale with citizens of such other States. The agreement was alleged to be entered into in order to enhance the value of the iron pipe dealt in by the defendants. On the trial of the case, the agreement entered into between the parties was in evidence. There was also evidence introduced as in this case tending to show outside of the agreement, what its ulterior purpose was.

That case was founded upon the Act of Congress above referred to. It was urged against that proceeding by the corporations, that the Act of Congress above mentioned, only applied to the States and in no way applied to the trade between the citizens or as affecting the trade or commerce between the citizens personally and individually of the States, but this contention was held untenable and that this act extended so as to cover and regulate interstate commerce by means of private contracts between individuals or corporations, as against individual corporations or persons of other States. And that when private contracts entered into undertake to regulate interstate commerce, they were within the power of Congress to condemn and that such contracts under that act were void, and that it was wholly immaterial what was the design or purpose of the contract. That the design does not constitute the material thing. The fact of the regulation is the important thing and it is unimportant that it was not designed or designed for any particular purpose. That the power of Congress to regulate commerce among the several States, included the power to legislate on interstate commerce, which affects or regulates that commerce.

In that case, it was objected by the appellants that even if their contract might affect interstate commerce, that it was only a reasonable restraint upon competition and was formed for the only

purpose of protecting the parties in an honest attempt of securing prices for their products that were fair and reasonable to themselves and the public, and that they did not come within the Act of Congress because the agreement was not one which amounted to a regulation of interstate commerce, as it had no bearing upon or relation to that subject. But this proposition was held to be untenable and that the effect of the contract was to create a more complete monopoly over the trade which the defendants were attempting to exercise, and in addition to this, that the manner in which the companies exercised the power in that case also showed that it was intended to be in restraint of competition and creating a monopoly and regulation of interstate commerce. By that arrangement the corporations in that case were enabled to deprive the public, in a large territory, of the advantages otherwise coming to them and affected the competition and controlled the question of supply; that any such contract created a monopoly and was tempered with the fear of competition and a purpose to control it. And that in order to avoid the contract and arrangement under this act, it was not essential that the contract should result in a complete monopoly or control, if it tended to that end, and deprived the public of the advantages which would flow freely from competition in the absence of the contract.

It was urged further in that case by the corporations, in their evidence and affidavits, that their prices and rules and regulations were reasonable, and the Court there said: "We do not think the issue an important one, because as already stated, we do not think at common law there is any question of reasonableness open to the Courts with reference to such a contract. Its tendency certainly was to give the defendants the power to charge unreasonable prices had they chose to do so."

And then further, said: That the power of dealing with any kind of monopoly, may be properly a matter for the regulation of Congress in any subject, where it may even ultimately affect the subject. That the regulations of commerce applied to the subject and not to the matter of internal police. "Contracts to buy, sell or exchange goods to be transported among the several States, the transportation and its instrumentalities and articles bought, sold or

exchanged for the purpose of such transit among the States, or put in the way of transit, may be regulated because they form a part of interstate trade or commerce." And that it was sufficient that the effect of the contract or agreement was to affect interstate commerce, and that all articles or subjects of commerce were proper matters of regulation, because they formed in themselves interstate commerce, and the immediate result and effect of the agreement there in question, necessarily put a restraint upon interstate commerce in respect to articles to be transported beyond the State in which they were made; and that the dealers in any commodity could not agree among themselves so far as it affected parties beyond the State lines upon any matter or subject, and in any restrain in the interstate trade. That interstate commerce consists of intercourse and traffic between the citizens or inhabitants of the different States and included all the transportation of property as well as persons, and the purchase, sale or exchange of any commodity. And that any agreement which operated upon the free restraint of the delivery of any article of interstate commerce, by either preventing or restricting it, was an embargo upon interstate commerce to that extent. And to that extent, violates the statute. And that it was useless for the appellants to contend that they did not intend to regulate or affect interstate commerce; that they did intend to make the arrangement they made, and if such was the result, it was wholly immaterial what was the intention or object of the makers.

The case at bar presents a situation in which the Board of Trade first assuming that the market quotations are its own private property, conceives a gigantic scheme to attempt to control these continuous market quotations in which the people of the entire Nation and of every State and Territory therein, are vitally interested and affected, and particularly the grain handlers and dealers in provisions, millers and all handlers of bread stuffs, are powerfully affected. And undertakes the furtherance of a plan of entering into a contract by which they will sell this subject of commerce to the telegraph companies, but by such contract retain the right to discriminate and determine who shall and who shall not receive the information; the purpose of which contract,

disguise it as they may, was to place the board in the absolute control of the question as to who should and who should not be their competitors throughout the United States, and to give them the power and right to determine arbitrarily and of their own accord, whether right or wrong, that every party to whom they did not want the quotations to go, could be decided by them, to be unfit persons to have the, and when they had so decided, that the telegraph companies should not allow such parties as they had excommunicated, to have or purchase of the telegraph companies this matter of commerce, under any terms or conditions.

This contract is of the most wicked and vicious kind, and tends absolutely not only to limit, but to absolutely stifle all competition and place it in the hands of this Board of Trade; to outlaw all citizens of all the States, the plain proposition and object being as shown by the evidence in this case, that no party was to have them, or be permitted to purchase them from the telegraph companies to whom they had been sold, unless such purchasers would pay tribute to this gigantic Board of Trade, and thus lay a complete embargo upon a great subject of interstate commerce; and the fact that in the contract they pretend to seek to prohibit only parties that may be intending to use them for illegal purposes, is but a deception and a subterfuge and an attempt to put on the cloak of morality, so as to give apparent semblance to good intentions. And use it for the purpose of justifying the violation of the law, and as a reason for their own violation of the law. But they are not the arbiters of the morals of the citizens of the several States of the Union, and if they are, Congress has made a mistake in overlooking them. They cannot justify the entering into contracts to cut off competition and discriminate against the citizens and build up a monopoly for themselves in any article of commerce by pretending that this subject of commerce is dangerous in the hands of other people; or that others may become equal gamblers with themselves. If the subject of commerce is an innocent one, it is no concern of this Board of Trade, and is no justification for entering into the contract as against citizens of some other States or Territories of the Union, even though they may, when they receive it, use it for improper purposes. That is

purely a subject for the local laws of the State to determine.

As well might it be said that a contract entered into between the manufacturers of fire arms of this country in violation of the interstate commerce act, and which attempted to cut off competition and build up a monopoly by leaving it to the firearms companies to determine what parties should have a right to purchase in the United States, was valid, because the contract said that its object was to prevent such parties from having them as might, in their opinion, use the same in the robbing of railroad trains, or in shooting across the public highway.

That the fact, if it be a fact, that parties might use these quotations after receiving them, for illegal purposes or partly illegal purposes, is no concern whatever of the complainant and is no justification for its unlawful contract.

57 Ind. 495 *W. U. Tel. Co. vs. Ferguson.*
92 Ill. App. 604 *Christie vs. Board of Trade.*
99 Ill. 487 *Cope vs. District Fire Assn.*

II.

But another proposition as to why this contract is in violation of the Act of Congress above referred to, is this:

The contract between the board and the telegraph companies sets forth the character and kind of a contract that the applicant shall sign to the telegraph companies, which is to be turned over to the Board of Trade to pass on, and its first provision is that the applicant shall agree as follows: "That our business is and shall be the business of ....., and that we are not keeping or causing to be kept and will not keep or cause to be kept, any bucket shop, *or any office, store or other place*, wherein is conducted or permitted the business of making or offering to make contracts, agreements, trades or transactions respecting the purchase or sale, or purchase and sale of any grain, provisions or other commodity or property wherein both parties thereto or the undersigned, contemplate or intend that such contracts, agreements or transactions shall be or may be closed, adjusted or settled according or with reference to the public market quotations or prices

made on any board of trade upon which the commodities or securities referred to in said contracts, agreements, trades or transactions are dealt in and *without a bona fide transaction on such board of trade or exchange.*"

This provision was the most iron clad and complete possible restriction and monopoly that could possibly be imagined. Under this provision, even though a party did not run an illegal business, even though he did not keep a bucket shop, but if he run any office, store or other place of business, he could not make any trades or transactions unless he made them on the Board of Trade that handled the articles in which he dealt; and must make the transactions on the Board of Trade or exchange. In other words, under this agreement, no party in the United States could be permitted to have these market quotations unless he would agree as a condition to it, in conducting his legitimate business, that he would have to do all of his dealing by transactions on the Board of Trade that dealt in the articles that he desired to deal in.

This is the most violent, vicious and absolute character of agreement to monopolize the trade of the country. No man in the State of Missouri or elsewhere would have a right to deal in the buying and selling of grain and use the quotations of this gigantic corporation, unless he would sign an agreement with the telegraph companies subject to the approval of the Board of Trade, that he would use these quotations only by making all of his transactions through this Board of Trade of Chicago. He could not have these quotations, or be permitted to use them if he should make a trade on any Board of Trade in St. Louis, Minneapolis, St. Paul, Kansas City, New York or elsewhere, but as a condition of receiving them, he must acknowledge the absolute and unrestricted duty of paying tribute to the Board of Trade of Chicago, otherwise, he would be refused the quotations. And further, after he had made such arrangement and agreed to do so, if he should violate it and not place his deals through the Board of Trade of Chicago after having received the quotations, he should be at once cut off. How is it possible for the complainants to escape the proposition that they are clearly in face of this provision of the United States Congress? And this provision of the contract required him, as a

condition of receiving these quotations of the market prices of the commodities on the Chicago Board of Trade, that in all contracts that he made it should be done on their own Board of Trade, and this provision has nothing whatever to do with bucket shopping, but was a plain, unvarnished agreement that no one should be permitted in the United States to do a legal business and be entitled to purchase these quotations unless he placed his business through the Board of Trade from which the quotations emanated, which are, and were, the quotations of this Board of Trade of Chicago, the complainants in this case. In other words, he should not have a right to buy and receive the quotations if, after receiving them, he made contracts or agreements of any kind, to be closed with reference to the market quotations on the Board of Trade of Chicago, unless he placed his trades through the Board of Trade itself. This provision, if allowed to stand, would compel as a condition precedent that every grain dealer or handler of grain throughout the United States who desired to buy the quotations of the Board of Trade of Chicago, should not be permitted to use them or make any trade; as to the commodity dealt in with reference to the prices of that Board of Trade unless he allowed the members of that Board of Trade to have a monopoly of the business; and when Mr. Warren, the president of the board, declined to allow the defendants to receive the quotations except upon the condition that they should place their trades through the Chicago Board of Trade, he was doing nothing more than the absolute provisions of the contract provided should be done. And we again urge that the contract which the complainant is seeking to enforce, and asking the defendants to be enjoined until they come in under, must be held in violation of the Act of Congress.

III.

And again, another peculiar provision of this contract in restraint of trade and of right, is that it requires every applicant who asks the quotations, to sign a written statement "that the telegraph companies have acquired the exclusive right to the quotations." In other words, as a condition to his having the right to trade in

these commodities, and use these quotations, the applicant and even the correspondent of the applicant, must admit that some contract made between the Board of Trade and the telegraph companies has transferred an exclusive right to such third party. We contend that the contract is one of the most complete schemes and efforts to absolutely control and monopolize for the use and benefit of the members of the Board of Trade of Chicago, any and all business in the United States, in reference to grain transaction, where such parties throughout the United States use their quotations, and that they shall not have the right to acquire the quotations at any price unless they shall so use them in their transactions as to pay tribute to the members of the Board of Trade.

IV.

For the purposes of the foregoing argument, we have extended to our adversaries a concession to which they are not entitled under the admitted facts in the case, namely: That the Board of Trade possesses a private and exclusive property right in these quotations unaffected by any public use or trust. We shall hereafter discuss, and, we believe, demonstrate, that such is not the character of the interest of the complainant in these quotations. Our position in the application of the doctrine of Federal control under the constitutional provision as well as the act of 1890, over these quotations, rests upon the proposition, first, that the telegraph companies are instruments of interstate commerce; and, second, that their business, including the transmission and dissemination of this information, is commerce, which, when it passes the limits of the State of Illinois, becomes interstate in its character. That for those reasons, the telegraph companies are incapacitated from entering into contracts of the character disclosed by this Record. As said by the Supreme Court of the United States in Texas vs. Tel. Co., 15 Otto 460-466:

"A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce and their business is commerce itself."

As to the attitude of the telegraph companies as related to

the question at issue therefore, there can be no doubt and no further comment is necessary. While it may perhaps demand more consideration we nevertheless believe that it is equally true that the particular business in question here constitutes commerce within the meaning of the term as used in the Federal Constitution and Statutes. It is furthermore worthy of observation that the Board of Trade, by its contract, has put it beyond its power to deny this assertion upon our part. The practical effect of the contract between the Board of Trade and the telegraph companies is that the Board of Trade is selling to the telegraph companies this property, or commodity, if you please. It is true that as a part of the consideration certain restrictions are placed upon the ultimate right of disposition of this property by the vendee. But that is apart from the particular question here. We repeat, that the Board of Trade has sold, and the telegraph companies have bought, something which both parties are conclusively presumed to anticipate will be transmitted and which, for more than thirty years, has been transmitted and put into the channels of commerce in all of the States of the Union.

As said by the Supreme Court over and over again, commerce undoubtedly is traffic, but it is something more, it is intercourse, and by that is meant every species of commercial intercourse, and therefore it includes buying and selling and interchange of all the commodities subject to sale or purchase or exchange. Both parties to this contract contemplate a sale and an exchange of this commodity, to-wit: the information furnished by these quotations.

But it may be answered that the characterization of the effect of this contract, which we make, is too broad, and that it is more analagous to the arrangement under which the Associated Press transmits its messages over the telegraph lines and to other States, there to be delivered to subscribers. In other words, that this is not a regulation of commerce, but is merely the transmission of certain information to a selected list of correspondents. This, however, overlooks the vital distinction between the case of the Associated Press and that of the Board of Trade in this, to-wit: That the Associated Press deals directly with the recipients of the news,

the function of the telegraph company being confined to carrying the messages between the sender and the sendee. Whereas, in the case at bar, the Board of Trade has no contract with the recipients of this information as to the matter of transmission, and long prior to the time they received it, has absolutely divested itself of all ownership therein, by an absolute sale and delivery to the telegraph company. In other words, the telegraph company has broadened its public function as related to this class of business, and instead of confining itself to the mere instrumentality of carrying between two independent parties messages, has undertaken to itself become a party to the dissemination of this information. It is the owner of this information. It is its business not only to carry, but to find the purchaser of that which it has bought and received from its vendor, the Board of Trade.

Is there any difference in principle between this commodity which the telegraph company has received and paid for, and a shipment of coal which a railroad company might have purchased from a mine operator and which it proposed in turn to sell and deliver to such customers as it might find? In the supposed case of the railroad company, the coal is no more an article of commerce, and when it passes the borders of the State, interstate commerce, than are these quotations which the telegraph companies are daily selling to the world at large, and which they have been engaged in transmitting and selling for many years past. If, therefore, it be true that these quotations are the subject of commerce, and that the telegraph companies are instruments of commerce, it must follow as the night the day, that the effect of the contract between the telegraph companies and the Board of Trade is to regulate commerce, which, so far as its interstate feature is concerned, is utterly beyond their power. Neither is the effect of this contract, in so far as it regulates interstate commerce, casual or incidental to the real purpose of the contract, because the sole and only purpose of the contract relates to the sale and disposition of this commodity. No other earthly reason exists for the contract, except such sale and disposition. Eliminating that purpose and object from the contract entirely emasculates it of any object whatsoever.

V.

But independent of and outside of the consideration of the United States constitutional provisions and of the acts of Congress in reference to interstate commerce and eliminating it entirely from consideration, another feature is presented in this case, which cannot escape necessary consideration, and it is this: the Supreme Court of the United States in the case of Western Union Telegraph Company vs. Call Publishing Company, 181 U. S. 92, has decided, if indeed there ever was any doubt on the question, that the principles of the common law are operative upon all interstate commercial transactions independent of any regulation of the subject by Congress. Therefore, we present the proposition that this contract was made between the Board of Trade and the telegraph companies, is in conflict with the principles of the common law enunciated by the Courts, in that it is an unlawful restraint on traffic and illegal because of its necessary tendency to impose improper restraints upon trade.

And we assert that all of the authorities agree, even at common law, that it is sufficient if the contract tends in the direction of creating monopoly or restraining trade and to deprive the public of the advantages which flow from free competition.

The Act of Congress of July 2nd, 1890, was but declaratory in concrete form and providing specific remedies for what was already the common law upon the subject.

This proposition is discussed and approved in U. S. vs. E. C. Knight Company, 156 U. S. 1.

SECOND.

This case is different from the case decided by the United States Circuit Court at Cincinnati, Board of Trade vs. O'Dell Commission Company, 115 Fed. 574, in this, that in the O'Dell case the testimony showed that the defendant, O'Dell Commission Company, was engaged in bucket shopping, while in the case at bar there is no testimony showing, or tending to show, that the defend-

ants are engaged in bucket shopping or violating the Statutes of the State of Missouri or Illinois on that subject. In other words, for the purposes of this case, it is engaged in a legitimate grain business.

The bill of complaint, however, in this case is precisely as it was in the O'Dell case, and we assert that the bill of complaint in that case, as well as in this one, was founded upon the proposition and assumption that that complainant had a right to maintain its bill and had an equity resting upon the proposition that the defendants were bucket shopping, and but for that fact, they would have no equity.

The bill further proceeded to charge this proposition and expressly thereafter sets up that the defendants were engaged in the business of making contracts, agreements, trade and transactions in grain with reference to the public market quotations of prices made on boards of trade or exchanges and without bona fide transactions on boards of trade wherein both parties contemplate that the agreements, trades or transactions shall be closed or terminated when the market quotations or prices reach a certain figure, and that many persons were intending to use these quotations for gambling in the fluctuations of prices, and that bucket shops were using these quotations throughout the country and stating that such bucket shop transactions were contrary to the laws of the State of Illinois, and that when losses were incurred in bucket shops the customers erroneously believed that they had suffered from the dishonesty of the complainant, and that their good name, reputation and integrity had been disturbed, and that because of such bucket shopping they found it necessary to enter into the agreement set up, and that they adopted certain regulations to prevent the sale and distribution of the quotations to persons conducting so-called bucket shops, and then pleads the contract made between the telegraph company, and that they hoped that the defendants in this case would sign the contract not to use it for bucket shopping, etc., and then charges that if any person be permitted to have them they can furnish them to bucket shops throughout the country, and "Thus, entirely defeat the efforts of your orator to prevent their use in bucket shops as a

basis for their illegal bets, and destroy your orator's right to realize money from the sale of said quotations."

So that it will be seen that the bill is based upon and recognizes the proposition that their remedy, if any, must be predicated upon a theory which assumes the fact that defendants must be shown to be bucket shopping. This is the main and ultimate fact upon which the equity in the bill is based, and in looking at the agreement pleaded in the bill, it will be seen that the right of the telegraph company is complete and absolute to furnish the quotations to whomsoever it pleases, if the applicant signs the conditions, provided, however, that they are not given to bucket shops, and that proposition is found in Provision 2 of the agreements, which says:

"Second. Said parties of the second and third parts agree that they will not knowingly furnish or sell, directly or indirectly, said continuous quotations to any person, firm or corporation, conducting a bucket shop or other similar place where such quotations are used for a basis of bets or other illegal contracts based upon the fluctuations of the prices of commodities dealt in on said Board of Trade."

And then, as a means of carrying this out, the contract with the telegraph company and the Board of Trade, provides for an elaborate procedure by which every applicant shall sign a written application to the telegraph company wherein he agrees not to use them for such purposes, so that the contract entered into by the telegraph company and the Board of Trade was an absolute sale, for a consideration, of the right to use, on behalf of the telegraph company, and they had a right to let anybody have them that they pleased, except that they should not allow bucket shops to use them.

Now, it being conceded in this case that the defendants are not bucket shopping nor using the quotations for improper purpose, the only interest that the Board of Trade could possibly have, under the contract, has vanished, and it is conclusively shown not to exist. If the defendants are not conducting a bucket shop, and are not using the quotations in bucket shopping, as it must be conceded they are not, under this evidence, then the Board of Trade has no interest in the proposition: It is in no way brought

into discredit; it is in no way injured, and if it be true that the defendants are honest and for proper purposes surreptitiously obtaining from the telegraph company the quotations, the telegraph company is the only party who has any substantial or financial interest in the matter, and we again assert that the complainants, themselves, recognized this proposition, by elaborately setting out in the bill the fact that the defendants are bucket shopping and using the quotations for that purpose, and were thereby bringing the Board of Trade into disrepute in some way and depriving it of business by injuring its reputation in that it might be supposed that it, itself, was engaged in bucket shopping.

If the contract between the telegraph company and the Board of Trade was an absolute sale of the information, the Board of Trade could not be injured or have a remedy, even if the telegraph company had absolutely given the quotations away, and the telegraph company, under the contract, had the right, if it desired to do so, to give to every person in the United States, except bucket shops, if the contract signed by the applicants the free and unlimited use of the quotations without any compensation. There is nothing in the contract whatsoever that fixes any limit or price that the telegraph company shall fix for the information or quotations, and the telegraph company, under the contract, has the unlimited right to give them away if they want to, and the Board of Trade could not interfere against the telegraph company, if they did so, nor neither could they enjoin any parties that were receiving from the telegraph company, who did not pay for them, nor neither could they enjoin a party who receives them from the telegraph company without license or pay, as it cannot be shown, and is not shown, that the Board of Trade can, in any way, be financially affected thereby, or that it was a right that they ever had, and if this right existed so far as the telegraph company is concerned, the complainant cannot seek to enjoin a party who is doing a thing he has a right to do, as far as the telegraph company was concerned, simply because he did not sign a contract with the telegraph company. That is a matter purely for the telegraph company, unless the Board of Trade can be shown to have some substantial financial interest in the matter. In other

words, the only interest that the Board of Trade could possibly have would be to prevent them from being used for bucket shopping, and by showing that they were so used, and the only provision in the contract in reference to the limitation upon the telegraph company as to the free and unlimited use of the quotations as it pleases, is found in the following clause in the contract:

"But, if, within said time said party of the first part (Board of Trade) shall find upon investigation, and shall notify said telegraph company that said applicant wishes said quotations for any of said prohibited purposes, said telegraph company shall refuse to furnish said quotations upon said applications."

And this is the only qualification to the unlimited use of the quotations as the telegraph company pleases. And again we say they could send them broadcast throughout the country without pay of any kind, or permit parties to take them from their wires at any time, if they wanted to, and complainants would have no interest whatever in the matter as long as they were using them for proper and legitimate purposes.

It was suggested on the trial below, that the contract had provided that if legal proceedings should be commenced against the telegraph company on account of any delay in receiving quotations, or refusal to furnish them, and proceedings should be defended by the Board of Trade, who would pay all counsel and attorney fees, charges, damages, fines and penalties and expenses which the telegraph company may be put to, and that, if the Board of Trade should, at any time, ascertain that the quotations were being used for the purpose of conducting an illegal business of gambling in the commodities dealt in on the Board of Trade, or was conducting a bucket shop as defined by the laws of the State of Illinois, that they should inform the telegraph company, and that thereupon, the telegraph company should cease to furnish information to such parties, and that the Board of Trade would defend the action, or, that the Board of Trade might commence legal proceedings against such parties to enforce the contract and determine "whether such person, firm or corporation is using said quotations for such illegal purpose, or is using such quotations in conducting a bucket shop contrary to the terms of its business or

other agreement," etc., so that it will be seen that the right reserved to the Board of Trade is to interfere only when parties are using the quotations for illegal purposes. In other words, that agreement simply provides that after the contracts were entered into, if they were violated by parties using them for illegal purposes, that the Board of Trade might maintain an action, but this agreement was based upon two assumptions, first, that the contract must have been entered into by the alleged bucket shoppers, and, second, that they had violated the agreement by using the quotations in bucket shopping, or illegal purposes, after they had made a contract and received the quotations under it. This contractural right did not give the Board of Trade any authority whatever to interfere except where the parties were using the quotations in violation of law, and indeed, recognizes upon its face, that they had no interest in any other phase of the proposition, and could not have, after they had sold them to the telegraph company, without qualification, as to whether the telegraph company should charge for them or give them away, or permit other parties to use them without compensation. The only interest they were claiming to have, by the contract, was that they should not be used for bucket shopping, and if they were so used, and the telegraph company did not elect to stop them, that the Board of Trade itself might step in and bring action. So that we must insist now, that there is no equity whatever shown in this bill, and the facts do not exist upon which this bill can be maintained, and furthermore, that it is proven that it could have no remedy of any kind under the evidence in this case, unless the defendants were shown to be bucket shopping and violating the law and using the quotations for illegal purposes.

It was suggested, however, by counsel for the Board of Trade on the argument below, that it cost the Board of Trade a large amount of money to conduct the business of gathering the information, but this is no answer whatever. They sell the information to the telegraph company for thirty thousand dollars a year, and the question as to whether or not the Board of Trade spends one dollar or a thousand dollars in furnishing them to the telegraph company has nothing whatever to do with the proposition,

because, if the telegraph company has, as they do have under the agreement, the absolute right to give the quotations away to everybody in the United States, the Board of Trade's interest cannot be different because it costs them something to furnish them to the company. If they have sold them to the company, as by the contract they have, and the company has the right to do as they please with the quotations as long as they do not give them to bucket shops, how is it material what it costs the Board of Trade to carry out this contract with the telegraph company? But we assert that the evidence shows that the Board of Trade does not pay a cent nor expend a cent gathering this information. Its president, Mr. Warren, at pages 838 and 839 of the bound testimony, states:

Q. Does the Board of Trade pay out anything for those market reports at the present time? A. No, sir.

Q. How long since it has paid anything on account of market reports? A. In what way?

Q. Paid cash for gathering them? A. For gathering them?

Q. Yes. A. Since the 1st of August, 1900.

Q. Has the Board of Trade received anything from the Cleveland Telegraph Company on account of those market reports that the Cleveland Telegraph Company gathers? A. They have received by that means and the Cleveland Telegraph Company has paid these expenses for gathering them.

Q. Has the Board of Trade received more than that from the Cleveland Telegraph Company? A. I think they have.

Q. Do you think the Board of Trade has received, or did receive, during the year 1900, from the Cleveland Telegraph Company on account of the market reports, from August 1st to December 1st, the sum of $2,874.78? A. Between what dates?

Q. August 1st and December 1st? A. I couldn't testify to that, Mr. Jenks.

Q. Do you know that the Board of Trade has received cash from the Cleveland Telegraph Company? A. Yes, sir.

He then proceeds to state that Mr. Worthington, the assistant secretary, has control of the books in that particular.

Now let us turn to Mr. Worthington's testimony, and see what he tells us. On pages 863 and 864 of the Record, we find

the following questions and answers from Mr. Worthington, the assistant secretary. The volume of the report of the Board of Trade was handed to him, and under head of "Receipts from Cleveland Telegraph Company," there appeared an item of $2,874.78, and the following questions occurred:

Q. You will find another item there under the head of "Receipts from Cleveland Telegraph Company, August 1st, to December 1st, $2,874.78. Do you know what that amount is composed of? A. Composed of several payments made by the Cleveland Telegraph Company, showing their earnings.

Q. Showing its earnings? A. Earnings of the company.

Q. The telegraph company? A. Yes, sir.

Q. Did the Cleveland Telegraph Company pay that amount of money to the Board of Trade? A. Yes, sir.

Q. Was that for the privilege of gathering market reports on the floor of the exchange room? A. I presume it was.

Hence, we must insist that this bill must be dismissed for want of equity. The O'Dell case was retained by the Court for final decision only upon the theory that the defendant, the O'Dell Commission Company, was a bucket shop, and was using the quotations for bucket shop purposes, and that feature lacking in this evidence and upon which theory the bill was framed, it must follow that they have no standing whatever.

THREE.

But there is another reason in this cause which we urged and which, in our judgment, makes it unnecessary to consider the questions hereinafter discussed, and it is this, that there is no testimony whatever in the case showing, or from which the Court can even conjecture, that the defendants in this cause, use, post or exhibit the market quotations until after they have become public property in Kansas City. Let us see what the facts are in reference to this subject.

In the Record at pages 194 and 195 is found a stipulation. That stipulation reads as follows:

"It is stipulated that at the time of the filing of this bill, the defendant, the Christie Grain & Stock Company was, and ever since has been, posting in its office in Kansas City, the greater part of the continuous quotations collected upon complainant's exchange and transmitted to the telegraph companies, and it was also during said time, purchasing from the Western Union Telegraph Company, and posting the ten minute quotations of prices upon complainant's exchange. That said continuous quotations are furnished by the Western Union Telegraph Company to at least six different grain commission men in Kansas City without objection of complainant, and that such quotations are by said commission men, posted at once upon blackboards in their offices.

Defendant, however, claims that these continuous quotations posted by it, are not posted until first made public in Kansas City, which last proposition the complainant denies.

It is further agreed that during all the period above mentioned, said defendant, Christie Grain & Stock Company, has also been posting on its blackboard in its place of business, market quotations of prices made on the following exchanges: New York, Minneapolis, St. Louis, Kansas City, Milwaukee, Memphis, New Orleans, and also from Liverpool, London and other European markets.

The complainant reserves the right to show that such quotations of other markets are not the continuous quotations, but only occasional quotations of prices on such markets."

Now, we assert that the evidence conclusively shows that they are not posted by the defendants until after made public in Kansas City, and that complainant has not, under its reservation of rights, in any way shown that they are published or posted before they are made public in Kansas City.

Let us see, therefore, how this matter stands. Mr. Warren, president of the Board of Trade, at pages 841. and 851, of the bound testimony, states:

Q. Have you any idea of the length of time that elapses between the sending of the report from the floor of the exchange room of the Board of Trade, and the receipt of those reports at the other end of the wires at St. Louis, Minneapolis, Kansas City, San Francisco and New York? A. I know it is very brief.

Q. Do you know that those reports, when received at those various cities, especially in the city of Chicago, in Cleveland, in Cincinnati, St. Louis and Kansas City, are immediately posted

on blackboards in different offices in those cities? A. I have been so informed.

Q. And you believe it to be true? A. Yes, sir.

The complainant put upon the stand, Mr. Crawford, who, on page 249 of the Record, testified as follows:

Q. Were there any customers receiving these quotations from the Cleveland Telegraph Company at and prior to the time of the filing of this bill, who had not first signed one or the other of these two forms of contract? A. No, sir.

And on page 251 of the Record, the following question as to the Milwaukee Company:

Q. Now, prior to the time of the filing of the bill in this case, did the Milwaukee Telegraph Company furnish these quotations to any person, firm or corporation, who or which had not first signed a contract in one or the other of those forms? A. No, sir.

Complainant then put upon the stand James F. Morgan, chief clerk of the Western Union Telegraph Company, who states, on page 300 of the Record, that since the first day of August, 1900, their company has required all parties getting the continuous quotations to sign an application stating the use to be made of the quotations. He states that no parties are getting the quotations who have not signed the contracts, and that they are giving them to no parties who have not signed it; and that they are not furnishing them to any parties except those who signed the contract.

They then put upon the stand, William E. Griffitts, and who testifies that he has "charge of the distribution of the Postal Telegraph Company. He testified, on page 323 of Record, that no person got the quotations who had not signed the application set out in the contract.

Mr. C. C. Christie, on pages 529 to 532 of the Record, testifies:

Q. How many places in Kansas City do you know of, where the continuous market reports from the Board of Trade of the city of Chicago, have been received from day to day, for the past, say ten years? A. Oh, the number varied; I suppose the average ticker subscriber in Kansas City to the Chicago Board of

Trade quotations for ten years, would amount to twenty-five, possibly.

Q. How was it on the 9th of June, 1901, and for months prior thereto? A. Up to some date this summer or this spring. . .

Then on page 306 the following:

Q. Now, is there and has there been for years any other was of receiving market reports than through the ticker service? A. Oh, yes.

Q. What is that? A. People send them over public wires and over private wires.

Q. And they are received by means of a Morse telegraph instrument? A. Yes, sir; I suppose they are.

Q. How many people in Kansas City were in receipt of the continuous market reports by wire, telegraph wire, on the 9th of June of this year and for months prior thereto? A. Well, possibly eight.

Q. Who were those people that were allowed to receive the market reports on and prior to the 9th day of June of this year? A. They were brokers for Chicago Board of Trade houses.

Q. Go on. A. Those were the only people that were allowed to receive them.

Q. How about the Kansas City Board of Trade? A. Well, the Kansas City Board of Trade didn't get them; they posted the Minneapolis market for nearly a year, and did not again have the Chicago market until after this contract with the telegraph company. . . . . .

Then on pages 307 and 308, the following:

Q. In what manner, after the receipt of these market reports by wire, have the reports been treated in different offices, for the past number of years, say for ten; I speak with reference to blackboards more than anything else. A. They have been spread upon blackboards and made public just as soon as they were received over the wires; they were spread upon a blackboard on the Kansas City Board of Trade, taken from a sounder, Morse instrument.

Q. In what other places have they been spread upon a blackboard? A. In all these brokers' offices, the Board of Trade

brokers' offices. The Chicago Board of Trade brokers' offices say they did.

Q. And other places throughout the country? A. Yes, sir.

Continuing on pages 308 and 309, the following:

Q. Mr. Christie, for how long a time, to your own knowledge, have the market reports from the Chicago Board of Trade been spread upon blackboards in different offices? A. Just as long as I have been familiar with the business, twenty years. . .

And upon cross-examination, at page 565 of the Record, Mr. Christie states how he does get the quotations, showing conclusively that he has not gotten them except through a public source.

Q. How are you getting the quotations? A. All sorts of ways.

Q. Well, describe them. A. Over the telephone, by messenger boys, by personal observation, by wire sometimes.

Therefore, we contend, upon this proposition, that the situation is this: They have alleged in their bill that the defendants were using the continuous quotations of the Board of Trade as they were sent out. The answer under oath denies this. The burden rests upon the complainant to establish it. It is a material question in the case, and unless established, there is no case here.

In order to sustain their bill it is absolutely essential that they should show that we use their immediate continuous quotations. They have entirely failed on this proposition. They put the operators of the telegraph companies on the stand and they all show that we are not getting the quotations, and Mr. Warren himself testifies that nobody is getting them who has not signed these contracts. And it being admitted that we have not signed them, it is therefore proven that we are not using them at all, and we therefore assert that we are not using them at all until after they become public, and we charge that there is no evidence that we are using the continuous market reports at all until made public, although we do contend for the right to do so, but, at least, it can be clearly asserted under the testimony, that there is no evidence that we are using them until they are posted and made public in the various brokers' offices in Kansas City and by the Board of Trade of Kansas City, and if we use them thereafter, it cannot

be contended that we are using them at a time when they are not public property subject to the inspection of anybody and everybody that visits the public places described in the testimony. For this reason they have failed in their proof.

FOURTH.

But if the Court shall be of the opinion that the pleadings present any question for decision under the evidence, as it now stands, we desire to discuss another important question arising on the bill, and that is, that the contract made between the telegraph company and the board of Trade is *ultra vires*, against public policy, and void upon its face, for two reasons, first, that the market quotations are public property, and a property interest which is quasi-public in its nature, and not the subject of sale or barter of any kind, between the Board of Trade and the telegraph companies, and being impressed with the public interest, neither the Board of Trade nor the telegraph companies can contract with reference to the right of the public to it.

Second. That even if the first proposition were untrue, the common carriers, to-wit, the telegraph companies, cannot discriminate as to who shall and who shall not receive the market quotations brought into the State of Missouri over the public facilities as long as they are distributing them to the public generally, and that as long as the defendants are not engaged in bucket shopping under the evidence, they are entitled to the quotations by paying reasonable charges therefor, such as are paid by other parties generally, and that the telegraph companies cannot refuse to deliver information that is public to the balance of the community, because it has made a contract with the Board of Trade to not give them to bucket shops, and when the Court finds, as a matter of law that the defendants are not a bucket shop, they are entitled to use the quotations, notwithstanding they may not have signed some contract satisfactory to the Board of Trade.

PUBLIC PROPERTY QUESTION.

One of the main contentions in this case which we made below, and now desire to urge upon this Court's attention, is that the continuous market quotations are of such a character, brought into existence under such circumstances, and distributed throughout the country under such circumstances, and for so many years, that they have become impressed with the public right and are part of the community property of the country at large, and are not the subject of barter or sale by the Board of Trade and the telegraph companies, nor such as the telegraph companies can buy from the Board of Trade and convert to their own use against the public at large, other than the right, on their behalf, to establish a reasonable charge and furnish them to all the public alike, upon the payment of such reasonable charges.

This question was set at rest in an exhaustive opinion of the Supreme Court of Illinois where this corporation has its home.

New York and Chicago Grain and Stock Exchange v. Board of Trade of Chicago, 127 Ill., 153.

The Court's attention is directed to this case, not only upon the legal propositions involved, but also for the reason that it is a most correct statement of how these market quotations have been sent out for the last thirty years, and is practically, in its facts, a re-statement of what the evidence in this case has shown. That case holds that the Board of Trade with reference to these market reports has so conducted itself in reference to the same, that they have become clothed with the public interest and have been used in a manner to make them of peculiar consequence and to affect the community at large, and adopts the maxim and well known proposition that when one devotes his property to use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created, and holds that as long as the Board of Trade continues in the business of collecting and furnishing to the pub-

lic market quotations, whether it does it directly or indirectly, it must do so without unjust discrimination as to persons, and must furnish market quotations to all who may desire to obtain them for lawful purposes and upon the same terms. And that case, upon the vital propositions involved, was but following the celebrated case 94 U. S. 113 Munn v. People of Illinois.

While it is true that the Munn case was based upon the consideration of an act of the legislature fixing maximum price for charges for the storage of grain in warehouses, and that the legislature might control the same because of the quasi-public nature of the warehouse business, the decision was not founded alone upon the proposition that it was legislative and could not be controlled by the courts without legislation, and proceeds upon the theory that while the legislature may control a matter in the interests of the public, that that inherent right also rested in the court, and does rest in it, independent of the act of the legislature, and they say, among other things, in that decision:

> "The property does become clothed with public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

And again they state from Lord Ellenborough's decision:

> "There is no doubt that the general principle is favored both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but, if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms."

The Munn case proceeded upon the theory that the warehouse business was one of recent origin and that its growth had been rapid, and it was a business in which the whole public had a

direct and positive interest, and that the legislative act regulating the charges was only a matter of regulating that which was already public, and that the statute was simply extending the law so as to meet the new development of commercial progress, and in that case they again say:

> "So, too, in matters which do affect the public interest and as to which legislative control may be exercised, if there are no statutory regulations upon the subjects, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied."

We also call attention of the Court to the following case upon the same line:

50 Fed. 677., *Del. Tel. Co. v. Delaware.*

This was a decision by the United States Circuit Court of Appeals. In that case it appeared that the Postal Telegraph Company owned a telegraph system with lines extending throughout the country, having its principal office in Wilmington, Delaware, and that the Delaware Telephone Company owned a telephone exchange in the same city, and furnished telephone facilities to its customers, and one of its customers was the Western Union Telegraph Company, and the Postal Telegraph Company desired to also become a subscriber and enjoy the public privilege, which was refused it, and it applied to the Court for relief. And the Court said, among other things, that the telephone companies were engaged in public employment and while they were not required to extend their facilities beyond the reasonable limits they might prescribe for themselves, yet, they could not discriminate as to the class of individuals they would serve, and that if the telephone company had confined the use of its facilities to the carriage of personal messages for individuals and had excluded other telegraph companies, and others who were engaged in forwarding messages, the relator would probably have no ground for complaint; but, inasmuch as it did not do so, and had extended the privilege to the Western Union Telegraph Company, it must afford the same privilege to the Postal Telegraph Company. That the admission

of the Western Union Telegraph Company was its voluntary act, that having once accorded this right, it stood open to the public, and they said in that case, that the fact that the telephone company may have been prohibited by its patent right contracts from allowing telegraph companies to connect, was no answer, as it may be said in this case, that it is no answer to say that the Board of Trade has made a contract with the telegraph company to limit the people's rights, because they were not bound to make any such contracts nor enter into such contract, and the Court in the case cited took pains to again assert the proposition that those engaged in public employment in which the public was interested, were subject to control by the courts.

A similar question was before Judge Brewer while upon the circuit bench in the case

23 Fed. 539, *State of Missouri v. Bell Telephone Co.*

This was an application by the Baltimore and Ohio Telegraph Company to compel the Bell Telephone Company to permit the telegraph communication between it and the Baltimore and Ohio.

The defendant contended that it was operating under a license from the American Bell Telephone Company, and by the terms of its license could not establish telephone communication with telegraph companies, and it further appeared, however, that they granted to the Western Union Telegraph Company the privilege of communication. And Judge Brewer said, in passing upon the question whether they could compel the Bell Telephone Company to allow the Baltimore and Ohio to connect with it on like terms, among other things, the following:

> "I believe fully in the sacredness of property, but I think all property stands upon an equal basis, whether the property consists of gold dollars in your pocket, real estate or the ownership of a patent. There is no peculiar sanctity hovering over or attaching to the ownership of a patent. It is simply a property right, to be protected as such. Starting from that as a basis, while every property owner may determine for himself to what he will devote his property, yet the moment he puts that property into what I perhaps may, for lack of a better expression, define as the channels of commerce, that moment he subjects the property to the laws which control

commercial transactions; just as in the warehouse cases (Munn v. State of Illinois), in which that Court held that when an individual built a warehouse, and put his property into that kind of business, he subjected the property thus placed to the laws which controlled the transactions of commerce, involved in which was the power of the public, through the legislature, to regulate rates. No man holding property was bound to build a warehouse, or bound to put his property into that particular channel, but the moment he did so, he put it where the legislature could say, 'You may charge so much and no more, for the transaction of this business.' He put his property into the channels of commerce—as multitudes are doing—into the railroad business, into the express business and into other channels of commerce. Whenever the property is put into those channels, it is put within the power of the public, speaking through its legislature, or the power of the Court enunciating general rules operative upon such transactions, to modify leases, to modify licenses, control duties. So, notwithstanding this licenser has given to the licensee the right to establish a telephonic system in the city of St. Louis, with telephonic communication with only certain prescribed telegraph systems, the moment it permitted the establishment of a telephonic system here, that moment it put such telephonic system within the control of the State of Missouri, and the control of the courts, enforcing the obligations of a common carrier.

"A telephonic system is simply a system for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all. It may not say to the lawyers of St. Louis, 'my license is to establish a telephonic system open to the doctors and the merchants, but shutting out you gentlemen of the bar.' The moment it establishes a telephonic system here, it is bound to deal equally with all citizens in every department of business; and the moment it opened its telephonic system to one telegraph company, that moment it put itself in a position where it was bound to open its system to any other telegraph company tendering equal pay for equal service.

"So my conclusion is, that notwithstanding the terms of this license, which seems to inhibit it from dealing or giving its telephonic privileges to any other telegraph company

than the Western Union, the moment it established its telephonic system here, that moment it compelled itself to respond to the demands of any telegraph company, or any individual in the city tendering to it equal pay for equal privileges."

This same principle was applied also in the following cases:

36 Ohio st. 296, *State of Ohio v. Bell Tel. Co.*

17 Neb. 126, *State v. Neb. Tel. Co.*

118 Ind. 194, *Central Tel. v. Falley.*

67 S. W. 684, *State ex rel v. Kinlock* (recent case).

The Supreme Court of the United States in the Munn case, the United States Circuit Court of Appeals in the Delaware case, and Judge Brewer's circuit decisions in the Bell Telephone case, are, in our judgment, the federal views applicable to this question; and the views of the state courts of Illinois are well settled by the 127th, which has never been criticised or departed from.

Counsel for the Board of Trade on trial of the trial below, undertook to make some suggestions to the effect that while a private interest might be a public one, yet the courts could not act until the legislature had stepped in, but the Munns ease and all the cases above cited, show that is not true; that all public property is subject to control by the courts and not alone by the legislature, but the right of the legislature to act at all is predicated upon the first proposition, that the public right has already existed so far as the courts are concerned, and the Supreme Court of the United States in a recent decision by Judge Brewer,

Western Union Telegraph Co., v. Call Pub. Co., 181 U. S., 92; (21st S. C. Rep., 561).

has held that the principles of the common law are operative upon all commercial transactions except as far as they are modified by enactments, and that there is no federal common law different and distinct from the common law existing in the several states. Among other things they there say:

"But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate com-

mercial transactions are subject to no rules and burdened by no restrictions other than those expressed on the statutes of Congress.

"The common law includes those principles, usages and rules of action applicable to the government and security of person and property, which do not rest for their authority upon any positive declaration of the will of the legislature."

The decision of Judge Tooley, one of the local judges in Chicago, in pamphlet form, is handed in with this brief, on this same line, and which we commend for clearness, and as a correct position.

We also file herewith a printed copy of the decision of Judge Henry, of the local court of Kansas City, in a case some time ago decided, where an injunction was asked against the telegraph companies, which was a decision upon substantially the very facts that there are in evidence here, so far as the contention of complainant is concerned; and it appearing in evidence here that the telegraph companies are bringing these public market quotations into this State and to Kansas City, and permitting others to have them, we insist that they cannot discriminate as against these defendants, and refuse to allow them to receive them, even though they were a bucket shop, but especially so, when it is not shown that they are bucket shopping, but that they occupy the same position as other citizens of the State as to receiving them.

The question as to how long these market quotations have been sent throughout the country, and of the character and nature and circumstances under which same have been vested in and given to the public, is particularly shown in the testimony of Mr. Christie, Mr. Warren, Mr. Whitcomb, Mr. Behl, Mr. Whitford, and Mr. Boyd on the following pages of the Record: As to Mr. Christie, pages 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532; and to Mr. Warren's testimony on bottom of pages 841 and 951; and to Mr. Whitcomb's testimony showing that market reports have been sent out since 1873, on pages 904 to 908; and Mr. Behl's testimony at pages 909 and 910; and Mr. Whitford's testimony on pages 915 and 916; Mr. French, page 369.

We were able to trace back as to the time for commencing the

sending out of these quotations as far as 1870. Prior to this time it was impossible to get any record, as the telegraph company's papers were destroyed by the Chicago fire; but Mr. Edward Whitford was put upon the stand, and his testimony, commencing at page 915, alone would be sufficient to settle the matter. He stated that he was first employed as an operator for the Western Union Company in 1868, and remained with the company until 1884, and that the Western Union Telegraph Company first commenced sending out these continuous market reports from the Board of Trade about 1870.

Q. (Page 916.) How long to your knowledge, did the Western Union Company continue to send out market reports, the continuous market reports from the Board of Trade of the city of Chicago? A. I don't think they have ever stopped. They have been ordered to stop, but by injunction, have continued, through the influence of injunctions.

He then stated, on cross-examination, that prior to the time the Western Union sent them out, that the Morse Bros. had been sending out these quotations; they had been doing so prior to the time of the fire.

The testimony of Mr. Christie, who has been in the grain business, as long, almost, as anybody in the country, should be consulted on this point. On page 522 of the Record, the following occurs:

Q. Do you know for how long a time on the floor of the exchange room of the Board of Trade the reports of transactions there at the pits have been gathered and sent out to the public? A. It dates back farther than my experience.

Q. And your experience extends back how many years? A. To 1880.

Q. Do you know by whom, when your experience commenced, the reports were gathered and sent out? A. No, sir.

Q. At the first of your experience, to whom were those market reports sent? A. Any one who would pay for them.

Q. And they were sent and distributed? A. Yes, sir.

Q. And pay received by whom, in your first experience? A. By the telegraph company.

Q. What telegraph company? A. The Western Union.

And on page 523:

Q. For how long a time, in your experience, have continuous market reports been sent out over the wires and distributed among the people, to any people who would pay for them? A. You mean at various times?

Q. Yes, take it all the time? A. Well, with the exception of the last year, year and a half, is it?—and a period following 1890 pretty close, and another period of about 1886, I have no recollection of any time when the Western Union did not furnish them to everybody.

Q. Who wanted them? A. Yes, sir.

Q. What effect, if any, had the sending out and receipts of these market reports from the Chicago Board of Trade upon the business of the country, especially in the West, in commodities that are dealt in on the Chicago Board of Trade? A. The whole market price of the West is made by the fluctuations of grain on the Chicago Board of Trade, for future delivery.

Q. And what has that to do with the transaction of business in the country in the same commodities? A. Nearly every purchase and sale of grain in the West, the Northwest and the Southwest, is made and based on the price of that property in Chicago each day and from hour to hour.

Q. What will you say as to the effect of sending out these market reports to the public continuously for a great number of years upon the ability of any person in the country to deal in the same commodities without knowing what the market prices are in Chicago? A. It would be almost impossible to do any business in the country without knowing the Chicago market.

And on page 524:

Q. Mr. Christie, has the business of the country generally, in commodities dealt in on the Chicago Board of Trade, been at all affected by the fact that for a great many years last past continuous market reports have been sent out to the public generally? A. Yes, sir.

Q. To what extent? A. Why, to such an extent that the grain markets of the United States and the Southwest have been

absolutely made and controlled by the prevailing prices in Chicago, both on and off the various boards of trade located west and southwest of Chicago. The price of wheat in Kansas City goes up and down as the price of wheat in Chicago goes up and down, and the same is true in St. Louis, and the same is true in Minneapolis. . . . . .

We therefore urge, under the undisputed facts in this cause, and under the law, as declared by the various authorities cited, that it must be held that the market quotations are impressed with the public right, and that the Board of Trade cannot deprive the public of that right, nor can the telegraph companies be permitted to enter into contracts, which are but subterfuges or frauds, to evade the law upon that subject; and that the public market quotations, being a property interest which affects the public, and in which the public have acquired a right and interest which cannot be taken away from them, that they cannot be enjoined from the free and untrammeled use of them. As far as the testimony in this case shows, the defendants, even if using the quotations immediately as received by the other firms and the public in Kansas City, cannot be enjoined from using that which belongs to the public, and which, when put upon the public telegraph wires of the country and brought into the State, are public; and, upon this question, we think there can be no room for doubt, and that, hence, it must be held that there is no equity in the bill, and that any claimed right predicated upon a contract made and entered into between the Board of Trade and the telegraph companies is wholly beyond their power or right, and they cannot contract away the public interest and right in such quotations.

The modern trend of the commercial and industrial affairs of our country is bringing about and presenting constantly before the courts, new and important considerations. This public question, in its infancy, was largely confined to railroads and other carriers, but in the modern days of centralization of capital and the concentration of great business interests, and their gradual control, or attempt to control, the subjects of commerce, including almost everything in the line of provisions, fuel, transportation and all that goes to make up the necessary things for the

feeding, clothing and caring for the people of a nation, puts to the front important considerations to be handled by the courts; but we insist, while these new conditions are constantly arising and large and extensive confederated power is to be dealt with in its dealings with the public, yet no new principles of law are to be applied; it is simply the old principles, fundamental in the history of civilization, enlarged and applied to meet the new conditions. While these great questions, growing out of the control of great facilities and centralization of the country's interests and industries in the hands of power, in attempts to foster monopolies and cut off competition, are presenting situations more or less alarming to the public interest and the public good, and to some extent, having a tendency to affect the life of the people, the courts in the broad application of well known and ancient, sound principles of public policy, necessarily and does keep pace with the conditions.

There never has been a time, and we trust there never will be, when the principles of law and equity administered by the courts shall have become narrowed or restricted, so as to be unable to reach out the fostering hand of protection and control any matter or subject vital to the life of the public at large. And the case at bar, in our judgment, must be controlled and decided in line with the old principles restated by the authorities heretofore cited, "that when one devotes his property to a use in which the public has an interest, he in effect, grants to the public an interest in that use, and must submit to be controlled by the public to the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use, he must submit to a reasonable control.

FIFTH.

Another point we urge upon the Court, appearing from the facts in this case, is this: That it being admitted that the defendants are not violating the law or engaged in bucket shopping, and it appearing that the only parties that the Board of Trade desire to prohibit from receiving the market quotations are bucket shops,

or parties that use them illegally, and that the only limitation that they desire to place upon telegraph companies as to the free and untrammeled use thereof, was that they should not go to bucket shops, we assert that there is no equity here whatever, for this particular reason; under the contract, if legal, the telegraph companies had a right to sell them to anybody, or even give them to anybody, provided they were not bucket shops, and the only object of requiring the applicant to sign an application was simply to find out whether they were bucket shops, and to make them agree that they would not use the quotations in bucket shopping, and the evidence in this case showing that the defendants are not bucket shopping, the complainants could have no standing in equity, because they are such parties, as by the spirit of the contract, would be entitled to quotations anyhow, and if they are such parties as would be entitled to them, even admitting the contract to be good, the telegraph company not complaining, no damage nor hurt is done so far as the Board of Trade is concerned, and the Court cannot certainly say that if these parties are such parties as were entitled to receive the quotations, that they will be enjoined from using them because they do not sign a contract saying that they were not doing what the evidence shows they are not doing, to-wit, not conducting a bucket shop. In this state of the case, how can there be any equity here to enforce in favor of the Board of Trade? For it is apparent, that unless the defendants are bucket shops, the Board of Trade has no pecuniary interest in the subject at all, having sold their continuous quotations to the telegraph companies, with the right in the telegraph companies, to do as they please with them, and to give them away, without compensation, if they want to, and to allow parties to use them without their consent, if they want to, so far as the Board of Trade is concerned; and the Board of Trade could only have been damaged upon one theory, and can only have an interest upon one theory, and that is, upon the theory that the quotations were being improperly used under the terms and rights they reserve to themselves under the contract, and such not existing, under the evidence in this cause, they are out of the contest entirely, and the Court will not enjoin at the suit of the board, parties who would

have been entitled to the quotations, simply because they have not signed a contract to not use them for gambling purposes when the evidence shows that they are not using them for any such purpose.

SIXTH.

UNCLEAN HANDS PROPOSITION.

If the Court, after his consideration of all the previous questions, shall get to the consideration of this proposition, then, we say that the complainants must be turned out of court, for the reason that they came into a court of equity with "unclean hands," and that grows out of this suggestion: They are here asking that we may be enjoined from the use of their continuous market quotations. We answer that the complainants have no standing for the reason that these continuous market quotations are made by the complainant in a place kept and maintained by it, for the purpose of making them, and where it knows that they are being made, and that it aids in their making, and permits them to be sent out after they are made, knowing that they are made and created as a result of transactions which violate the laws of the State of Illinois and the State of Missouri; the statute of the State of Illinois upon that subject being as follows:

"That it shall be unlawful for any corporation, association, co-partnership or person to keep or cause to be kept within this state, any bucket shop, office, store or other place wherein is conducted or permitted the pretended buying or selling of the shares of stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other produce, either on margins or otherwise, without any intention of receiving and paying for the property so bought, or of delivering the property so sold; or wherein is conducted or permitted the pretended buying or selling of such property on margins or when the party buying any of such property, or offering to buy the same, does not intend actually to receive the same if purchased, or to deliver the same if sold; and the keeping of all such places is hereby prohibited. Any corporation or person, whether acting individually or as a member of, or as an officer, agent or employe of any corporation, association or co-partnership,

who shall be guilty of violating this section, shall, upon conviction thereof, be fined in any sum not less than $200.00 and not more than $500.00; and any person or persons who shall be guilty of a second offense, under this statute, in addition to the penalty above described, shall upon conviction, be imprisoned in the county jail for the period of six months, and if a corporation, shall be liable to forfeiture of its charter. And the continuance of such establishment after first conviction shall be deemed a second offense.

"It shall not be necessary, in order to commit the offense defined in Section 1 of this Act, that both the buyer and seller shall agree to do any of the acts therein prohibited, but the same crime shall be complete against any corporation, association, co-partnership or person thus pretending or offering to sell, or thus pretending or offering to buy, whether the offer to sell or buy is accepted or not; and any corporation, association, co-partnership or person who shall communicate, receive, exhibit or display, in any manner, any such offer to buy or sell, or any statements or quotations of the prices of any such property, with a view to any such transaction as aforesaid, shall be deemed an accessory, and, upon conviction thereof, shall be fined and punished the same as the principal, and as provided in Section 1 of this Act."

And the statute of the State of Missouri upon the same subject being as follows:

"Sec. 2223. It shall be unlawful for any corporation, association, co-partnership or person to keep or cause to be kept in this state any office, store or other place wherein is conducted or permitted the pretended buying or selling of the shares of stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities, either on margins or otherwise, without any intention of receiving and paying for the property so bought or of delivering the property so sold; or wherein is conducted or permitted the pretended buying or selling of such property on margins, when the party selling the same or offering to sell the same does not have the property on hand to deliver upon any such sale; or when the party buying any of such property, or offering to buy the same, does not intend actually to receive the same if purchased or to deliver the same if sold; and the keeping of all such places is hereby prohibited. And any person, whether acting individually or as a member or as an officer, agent or employe of any corporation, association or co-partnership, who shall be guilty of violating this section, shall, upon conviction thereof, be fined in

any sum not less than five hundred dollars, and not more than fifteen hundred dollars, and any person or persons who shall be guilty of a second offense under this section, in addition to the penalty above described, shall, upon conviction, be imprisoned in the county jail for the period of not less than six months and not more than twelve months."

"Sec. 2224. All purchases and sales or contracts and agreements for the purchase and sale of any of the property aforesaid, in manner aforesaid, as well as all transactions in stocks and bonds, petroleum, cotton, grains and provisions in the manner aforesaid, on margins, for future or optional delivery, are hereby declared gambling and criminal acts, whether the person buying or selling or offering to buy or sell, acts for himself or as an agent or broker for any firm, company, corporation, association or broker's office; and any person who shall be guilty of violating this section, upon conviction thereof, shall be fined in any sum not less than one hundred dollars nor more than five hundred dollars for each offense."

"Sec. 2225. It shall not be necessary, in order to commit the offense defined in the preceding section, that both the buyer and the seller shall agree to do any of the acts herein prohibited, but the said crime shall be complete against any corporation, association, co-partnership or person thus pretending or offering to sell, or thus pretending or offering to buy, whether the offer to sell or buy is accepted or not; and any corporation, association, co-partnership or person who shall communicate, receive, exhibit or display in any manner, any such offer to buy or sell, or any statements or quotations of the prices of any such property, with a view to any such transaction as aforesaid, shall, for each such offense, be deemed and held to be an accessory thereto, and, upon conviction thereof, shall be fined the same as the principal; and any such corporation, association, co-partnership or person permitting any such communication, reception, exhibit or display, shall, for every such offense, forfeit the sum of five hundred dollars, to be collected in a civil action instituted by the prosecuting attorney of the city or county wherein such offense occurs or is permitted to occur."

The evidence upon the question of the complainant's transaction in this regard, their manner of doing it, and the result thereof, has been clearly set forth in the opinion of Judge Thompson in the O'Dell case, 115 Fed., 574, and which opinion, we think,

disposes of the question we now desire to discuss, if followed by this Court. The Record in the O'Dell case is the same Record presented in this case. But, we ask now again, to re-present the question to your honor as if one of first impression, believing, that independent of the fact that any other United States Court ever decided the question, that this Court would irresistibly be led to the same conclusion, even if a question of first impression.

WHAT ARE THE CONTINUOUS MARKET QUOTATIONS?

So that there may be no misunderstanding to start with, we desire to state that the Board of Trade of Chicago maintains an exchange hall and the pits wherein is carried on the business of selling for future delivery, and maintains, at a large expense, a clearing house for the clearing of these contracts and transactions all under the rules and regulations of the Board of Trade. These continuous market quotations—and which constitute the market quotations which it is sought to prevent the defendants from using—are not, and never were, the market prices or quotations of the sale of anything for cash or immediate delivery. These are the quotations made in the pits; these quotations consist of a result growing out of the fact that members of the Board of Trade congregate in this pit and there make offers to sell a commodity to be delivered in the future, or offers for acceptances to buy grain or articles to be delivered in the future, and never for the sale of anything to be delivered except in the future. In other words, no cash transactions, or actual present completed sales resulting in immediate delivery ever take place within the pits, and the market quotations which are sent out are simply the result of this talk that takes place between the various parties in the pits as to what they offer to do in the future, and acceptances of those offers. This constitutes the market quotations involved in the suit.

In proof of this proposition we invite your attention to the testimony of Mr. Warren, president of the Board of Trade, at pages 839 and 840 of the Record:

Q. In gathering the reports at the pits, are the changes in price of a commodity noted and sent over the country without reference to the kind of deal that is made there at the pit? A. Every change of price is recorded so far as possible.

Q. Whether that deal is a scalping deal, a hedging deal, a deal in futures, or any other kind? A. Yes, sir.

Q. Whenever there is a change in the market that is sent out? A. Yes, sir.

And Mr. Hough, on page 461 of the Record, states as follows:

Q. What sort of transactions are conducted at the pits in the exchange room? A. What sort of transactions?

Q. Yes, are they for cash and immediate delivery, or are they for future delivery? A. Future option, future delivery, of course.

Q. What do you mean by future option? A. Well, trading now in the month of May, that would be an option; the month of January would be an option; the month of December would be an option.

And Mr. Watson, page 433 Record, says:

"They don't do any cash business in the pits, but it is all futures, and that 400 or 500 men make up the number in the pits, dealing in this future speculative business."

And Mr. Crawford, superintendent of the Cleveland Telegraph Company, states on page 326 of the Record, testifies as follows:

Q. They put down on the slip every transaction that is made there at which a price is fixed by one man offering to sell and another man offering to buy—is that it? A. If there is a change in the price, yes. There may be a great many transactions at a given price.

In speaking of the sales at the pits, he says, on page 263, as follows:

A. If you are talking about pits, then I think it is very seldom —it might be that there are transactions made that are not in futures in the pits, but I should think it very seldom. If they were made I should think our reporter there would hardly catch it.

Q. You don't know of any ever having been made there, do

you? A. No, not right in the trading—not right in the pit; no, what I mean by the pit. I don't know whether you know what I mean or not, by the pit.

Again, on page 264, he says:

Q. Now, in those places, do they offer to do anything or does the other man accept the offer except in transactions for the future? A. I think I have answered that, I say I don't think they do very often.

Mr. Watson, page 437 Record, says that, "The quotations in the pit, resulting from these ring deals upon which differences only are settled, constitute a large part of the market quotations sent out."

But, if there had been no oral testimony upon the subject at all, we find that the rules of the Chicago Board of Trade, which are in evidence and which were in force at the time this suit was instituted, and known as section 22, page 17, of the rules in force June 19, 1901, filed as an exhibit in this case and introduced in evidence the following:

"No member shall quote by public or private wire, or otherwise, any price except such as is the first for the commodity immediately following the time indicated on the tape or such as is thus posted on such blackboard. *No member shall be permitted to use prices made in actual transactions as quotations* or give the same to any person other than the one making the trade."

So that it is true that by the rules of the Board of Trade itself it recognizes that the quotations in the pit were not actual sales, and that it was not engaged in the business of actual transactions, and that it was not sending out quotations of actual transactions, but were simply sending out quotations of bets on the future, and by that rule it inflicted a punishment of suspension upon any member who should send out the price of any actual transaction as a quotation, for the obvious reason that the quotations were not made up of actual transactions, but were simply bets on the future, and it is obvious that actual transactions, to-wit: actual sales or trades, would be at different prices as a matter of course, from those constituting the quotations sent out, and therefore, the Board did not desire to have the actual cash transactions mixed up with

bets on future quotations, and by its own rule recognized that it had two kinds of transactions, one that was actual, and the other that was a mere quotation upon something that was to happen in the future.

Counsel stated on the argument below, that they had repealed this rule since this suit was brought, and it is true that they have, by a new edition of the rules out December 16, 1901, evidently printed complete in order to leave out that proposition; but, it was in force at the time of the filing of this bill.

NATURE OF THE QUOTATIONS.

This future dealing in bets is made up of different types of transactions. They are designated as "stop orders," "hedges," "rings," "transfer trades," "spreads," "direct settlements" and "scalping."

The following named gentlemen, at the following pages, will inform your honor what "stop orders" are:

C. D. French, pages 362 and 363 of the Record; Mr. Kinney, pages 384 to 387; Robert Nye, pages 400 to 401; Mr. Christie, page 521; Mr. Watson, pages 427 to 428 Record; Mr. Crosby, page 728 Record.

The result of the whole evidence is that a "stop order" is an order sent in by a customer from the country or by any other party, going to the broker and giving him an order, for instance, to buy wheat at a certain price, and if it goes against the dealer and he loses, to stop his loss at a certain sum; and this "stop order" may be given at the same time the order is, or afterward; as stated by Mr. French that if a party wants to limit his profit he would simply say, "I don't want to lose any more than so much, a cent a bushel, two cents a bushel, on that wheat, and you must stop the loss there if it declines," and he sends to the Chicago house a "stop loss" order. He would just say, "stop that 20, 10, 40, 50 or 100,000 bushels of May wheat at a certain price," which was an order to stop it at that price and not stay with it any longer, but to sell it out. For instance, if the party issuing the "stop order" was a holder of 100,000

bushels of May wheat and he wished to place the stop at two cents below, he would simply state to stop the decline on 100,000 bushels of May wheat at a certain price, at two cents, or whatever it was; that, on the Board of Trade, if the market declined at that point, the deal was closed out, and they rendered an account of sales; and the loss would be the difference between the purchase and the selling price.

Now, this is an illustration of what the "stop order" business is, and it is shown by the testimony to be very large and extensive in the pits. The parties never intend, and of necessity, cannot intend to take or receive anything under the execution of these "stop orders," for the speculative brokers in the pit are informed before they go in that they are buying or selling simply to speculate on the differences, and that the party does not intend deliveries, because he gives an order to close it out at a certain loss.

These transactions constitute a part of the market quotations that are sent out as market quotations throughout the country.

Mr. Christie, at page 521 Record, gives similar explanation: That the brokers would go into the pit and sell the quantity of wheat or grain and report that he sold so much on "stop orders."

These "stop order" dealings make up a part of the market quotations.

HEDGES.

This hedging business constitutes a very large part of the dealings in the pits. It is not contended by the counsel for the Board of Trade that there are any deliveries in those kinds of transactions among what is known as the speculative class, but that those hedges are resorted to by men who buy the actual commodity in the country. As a matter of fact it is defined by the witnesses to be a system by which the party who buys the grain in the country and then goes into the pit through his broker in Chicago and sells an equal quantity of the same stuff for some future delivery month, not with the idea that the stuff is to be delivered on the sale, but with the idea that it will protect him in

case the price goes against him as to the actual commodity, and thus save his loss. We contend under the testimony that this is the rankest character of gambling, and of all other classes of dealings, is the purest and simplest clean-handed gambling that exists because it is recognized by all the parties who testified that it is not their intention to deliver the stuff they have bought on those hedge dealings, but they are only made for the purpose of protecting themselves, with the possibility on their part that some of it may be delivered on abnormal markets, or where the markets are cornered by other dealers in the pit. The purchase of a commodity by these hedge deals is not made with the idea at all of delivering it on the sale made on the Board of Trade, but is purchased by them in the first place with the idea of selling the stuff they have bought in the country in the best market that it may be sold in, and after it is sold they take in the deal on the Board of Trade, and they all admit that the object and purpose of it is in the nature of an insurance and not that they intend to deliver the stuff they have sold in the pit.

And these hedging transactions constitute a part of these continuous market quotations that are sent out; but, in addition to this, it is shown that a very large proportion of the grain bought in the country is not deliverable at all or of such character or grade as to be deliverable at all on these hedging deals, and it is known by the parties that it is not deliverable, and cannot be under the rules of the Board of Trade. It is known by them that they do not intend to deliver the stuff under the hedging deal, but they expect to sell the stuff they bought, in the markets elsewhere wherever the highest price may be obtained for the article. and the hedging deal might as well be made on any board of trade in the country as the Board of Trade in Chicago, so far as the question of delivery on it is concerned, because it is recognized to be only a protection against the actual stuff going against them in price.

It was said by counsel on the argument below that the millers, who actually handle all the grain of the country, if not permitted to do this, would be injuriously affected, and that this system carried on by the Board of Trade afforded a great convenience to this class of dealers. This is true, and we recognize this proposition, and

we may here add that personally we never could see the force of any of the bucket shop laws, and as said by one of the witnesses in this case that he "would still make hedging deals, and that they ought to be made, even though condemned by the laws of the State of Illinois." We agree with all of this proposition, but we are dealing with the law as it is found, and not with what we think it ought to be. If these kind of transactions are violative of the statute of the State of Illinois and of this State, and if the parties do not intend to make deliveries on these hedging deals, as they certainly do not, then they are contrary to law regardless of the question as to whether such a law ought to exist. We say that the most that could be said of these hedging deals would be that occasionally some of them may be made where unusual conditions exist, and therefore that the most that could be said of the intention of the mind of the parties who make them is that they do not intend to deliver on them, but that they know that circumstances may arise occasionally in which it would be policy to make deliveries under the sales; but, that it is ever really intended by the parties, is in conflict with common sense and in conflict with the very nature of the transactions; and, if any party said that he always intended to deliver under such circumstances, the Court would know that he was not speaking the truth.

One of this class of dealers was placed upon the stand by the complainant, a Mr. Frank B. Rice, an extensive miller, and on page 199 of the Record he states that his house buys grain for the purpose of making it into flour and then the following questions and answers occur:

Q. You can't deliver this flour in fulfillment of any contracts you make on the Board of Trade, can you? A. No, sir.

Q. Why not? A. Because we buy wheat or sell wheat; we could not very well deliver a product of the wheat.

Q. Well, then, you do not expect ever to do so, do you? A. We do not expect to deliver flour on wheat contracts.

Q. Well, what do you expect to deliver on it? A. You refer, now, of course, to options?

Q. But the question is now, you do not expect to make deliveries, do you? A. Of wheat?

Q. Of the wheat. A. At present time, no; but I have.

Q. Well, I am speaking now, generally? A. Generally, no.

Q. You do not expect to do that . . . ? A. Generally, no.

Q. Now and then, that is in your mind at the time you make a deal on the board, is it? A. No, sir.

Q. Now, you say that nearly every time you make a hedging deal on the board, don't you? A. Yes, sir.

Q. And that hedging deal, as a rule, is about equivalent to your average results in the production of flour? A. The average, I suppose, of our trades, is in the neighborhood of 10,000 bushels a day. Not necessarily always bought.

Q. What do you mean by that—buying and selling both? A. Yes, sir.

Q. What did you buy to-day? A. I buy cash wheat sometimes. To-day I bought cash wheat and sold July.

Q. Well, now, you know pretty well about the custom and practice of millers generally on this subject, don't you? A. Yes, sir.

Q. You have advised us what you do, and then I suppose they do about the same as you do, having in mind the same object and purpose, don't they? A. That is the idea.

Q. Yes, do you know as a matter of fact that you do not have to deliver anything on these contracts unless you want to? A. That is so.

Q. And you know that you were under no obligations to either deliver or receive, but you may go on the Board of Trade at any time before the maturity of your contract, and close it out and get the difference in price, don't you? A. Or give the difference.

Q. I say, or give it? A. Yes, sir.

Q. Do you know that that can be done at all times? A. Yes, sir.

Q. *And that is the usual practice on the Board of Trade?* A. *Yes, sir.*

Q. *And has been for a great many years? A. Yes, sir.*

Q. *And is generally recognized by all millers, speculators and*

grain dealers of the country, isn't it? A. *Yes.*

Q. You say, if I remember your language, you were compelled or forced to make a hedging deal. Now, you mean by that, that notwithstanding, or even supposing, that the law of your State does not allow you to make a transaction without intention to make actual delivery, still if it is to the best interests of your business, you go on the Board of Trade and make those transactions to protect yourself, don't you? A. Yes, sir.

Q. You know that is so, don't you? A. Yes, sir.

Q. Notwithstanding the law? A. Yes.

Q. *And you know that is indulged in by millers as a rule—millers and grain men on the Board of Trade, year after year?* A. *As a rule, yes, sir.*

Q. You state that you sometimes receive grain? A. Yes, sir.

Q. Now, under what circumstances will you receive it rather than to cancel the deal? A. *When there is not sufficient of the product being received from country points to supply our requirements.*

Q. That is when the market conditions are not normal and regular? A. Well, not altogether.

Q. *Well, as a rule, that grows out of abnormal conditions of the market? A. Speaking generally, I say yes.*

Q. Did you ever deliver on those contracts? A. I have.

Q. Under what circumstances would you make delivery? A. *We have made deliveries when there was a corner in the wheat market, and values were forced to such a point that we could not use the wheat in making flour.*

Q. Well, you only delivered, as I said before, when some abnormal condition existed? A. *Yes, it is abnormal and forced value is on us. We simply converted the stock in our elevators into a delivery.*

Q. You made a sale to-day, I believe you said, on the Board of Trade? A. Yes, sir.

Q. You did not have the wheat on hand, did you? A. Why, certainly I did.

Q. Did you have an option? A. I had an option on hand.

Q. *But have you the wheat on hand that you expect to deliver?* A. *No, but I could deliver it.*

Q. *I am not talking about your contracts, now, but you have none on hand that you even expect or intend to deliver, have you?* A. *No, sir.*

Q. What? A. That is right.

Q. *And never do, at the time you make them, expect to do so, that is, your situation is that it may possibly happen that it will be the best thing to do, but you do not expect to do anything of the kind?* A. *Yes, sir.*

This witness, who makes hedging deals every time he buys quantities of wheat throughout the country, gives us a clear idea of what they intend: That they do not intend to deliver on a hedging deal, and that millers and grain men generally, do not intend to do so, but the most they anticipate or expect is that there may be some abnormal condition of the market in which it may be best to make deliveries, and not that they ever intended or expected at the time the deals are made that deliveries will ever take place, so that we can state that these hedging deals, from the very nature of them, are the purest kind of gambling transactions, and it is no answer to say that they are necessary and convenient things for cash holders of grain throughout the country. It does not matter, though they hold billions of bushels of grain in elevators throughout the United States; it in no way has anything to do with the hedging deal except that it is *a reason for making them*, and it may be a sufficient reason for it, but that does not change the proposition. If they sell a million bushels in the pit for future delivery, and afterwards buy it in, they settle on the difference like any other transaction, and the fact that they may own a million bushels of wheat in the country or elsewhere in no way changes that transaction in the pit so far as the trade is concerned on the board and which constitutes the quotations.

Upon the subject of hedging deals we invite the Court's attention to the testimony of Mr. French, on pages 368, 369, 374 and 375, of the bound testimony; of Mr. Kinney, on pages 386 and 387; of Mr. Nye, on pages 409 to 410; of Mr. Watson, on pages 431 and 443 to 445; of Mr. Christie, on pages 534 to 537; of Mr.

Boyd, on page 621; of Mr. Crosby, on pages 746, 749 and 750; of Mr. Warren, president of the Board of Trade, on pages 894 to 897; of Mr. Hough, on pages 470 to 471.

These hedge deals constitute a part of the market quotations.

RINGS.

The manner of closing at least 98 per cent of all deals upon which the continuous quotations are founded, is what is known as "rings." This is a system invented by the Board of Trade for the very purpose of preventing deliveries. Its object and purpose is to do away with deliveries and to cancel transactions between the members.

This "ringing" system can be illustrated by this suggestion:

A has July wheat sold to B at a certain price; B to C at a certain lower price; C to D again at a higher price; D to E at a different price than those preceding, and so on down the line until it has reached X, and X again has sold it back to A. There is provided by each firm or broker in this speculative business, settling clerks, who will, after the markets have closed in the pit, have a place of meeting, and who undertake to carry out the "ring" system, so that they "ring" out, or cancel transactions entirely around the "ring" by the casting up of the account or differences and settling the account or differences between the various parties, and in order to carry out this scheme and effectuate it, the board itself, through its directors, each day fix an arbitrary settling price, by which all deals that are settled or cancelled or "rung" shall be so cancelled with reference to the arbitrary settling price fixed by the board itself for the purpose of aiding brokers in arriving at the matter of settling of differences; and every trade that is made during the day that it is possible to "ring" up by these settling clerks is cancelled and settled in this way. Those that cannot be "rung" up remain open until such time as some other "ring" will take place, because the deliveries are all on future months, and the testimony shows that it is very seldom when a delivery time arrives that there is anything outstanding that has not been "rung" up.

The following gentlemen, at the following pages of the bound testimony, describe the "ringing" process and the extent and nature of it:

Robert Nye, pages 403 to 405; Mr. Watson, pages 423 to 425, 436 to 437; Mr. McHenry, pages 579 to 580; Mr. Fox, pages 801 to 802; Mr. Warren, president of the Board of Trade, pages 821 to 823; Mr. Comstock, pages 849 to 850; and Mr. Hough, pages 458 and 459.

It appears also from the testimony of the parties above cited, that every firm engaged in buying and selling in the pits, keeps a "ring" book, in which they show the settlements and bought and sold prices.

It is further to be noticed that none of these speculative dealers keep a cash sale book, for the reason that they have no use for it, and do not engage in such trifling business as selling anything for cash.

It appears from the testimony further that after the "ring" is made the trades are entered by the different brokers in their "ring" book, and the difference figured between the bought and sold prices and the settling price fixed by the Board of Trade, and then the difference is paid to or asked from the clearing house.

Now, it is evident, even if no witness had said so, that these speculators do not intend or expect that there will be any deliveries on any of these transactions, if the same can be "rung" up and settled, and that usually and generally they are completely "rung" up before settlement days. How can it then be said that they intend at the time these transactions are made that there are to be any deliveries? The most that can be said for it is that it may be that some of the transactions at the delivery time may not be "rung" up, and as to a small portion of it, a "ring" might not be completed, and in such instances a delivery may occasionally take place. This is well illustrated by the testimony of Mr. McHenry, one of the leading and long-time speculators on the Board of Trade, at page 681, of the bound volume of testimony. This gentleman has been an active member of the Board of Trade since the year 1867, and this is what he says at page 681, Record:

Q. How many transactions did you ever make at the pit on

the floor of the exchange room where you thought at the time you made the transaction that you would be compelled to receive and pay for the commodity. A. I could not answer that question.

Q. Did you ever make one? A. What is that question? I never made a transaction upon the Board of Trade in my life, either as a scalper or as a commission man, and I did not feel that I *might be compelled* to receive or deliver the actual property under that transaction.

Q. At the same time did you also feel that you could close out the deal before the time of delivery arrived? A. Yes, sir.

So that it will be seen that the most that this large and extensive dealer on the Board of Trade can say is only that when he bought that he felt that he might be *compelled* to receive the property if tendered to him; but at the same time that he always felt that he could close it out before the time of delivery arrived.

As an illustration of this system, which we are now discussing, we call the Court's attention to section 6, pages 43 and 44, of the rules of the Board of Trade, of June 19, 1901, from which it will be seen that the Board of Trade has a rule recognizing and furthering the settlement of all contracts and provides that where one trade can be offset against the other that they shall be deemed settled, and that the balance between the market value of the property covered by the trade and the several contract prices shall be the means of settlement, and the difference shall be due and payable immediately to the party entitled to receive them; and that the Board of Trade shall fix a settling price and post it in the exchange hall and in the settlement room of the board, which must serve as a basis for the adjustment or settlement of contracts made during that day; and, furthermore, they specifically require that each member shall keep a settlement book in which shall be entered the names of the parties with whom settlements have been made, and the trades included in them and the prices at which the commodities originally sold or purchased, and the amount due to or from each of them; and the board of directors set apart a suitable office to carry out this settlement process of the trades made during the day, and furnish employes for that purpose, and require the members to make reports show-

ing the net balance due to and from each member as shown by their settlement books, and provides that each report made by them shall be accompanied with a check for the aggregate of balances due from him or them on the contracts so settled.

These entire rules are made up of a most elaborate system, all for the purpose of doing what? Simply a matter of arriving at the manner and means of settling the differences of these speculative trades, and strange to say, none of these rules anywhere even hint or suggest that these brokers shall keep any cash books or keep any books showing the sales of any cash grain or of any actual deliveries or require that they shall make any, but have adopted an elaborate system of controlling the manner of settling the deals, cancelling them, "ringing" them out and paying the differences, all for the purpose of furthering only the immense system of settling profits and differences between its members from day to day, and cleaning up the transactions day after day, as they proceed.

In addition to this we find that section 8, pages 44 and 45 of the same rules, provides for a clearing house and requires the members to make reports of any offset of any outstanding trade for future delivery, not only requiring him to do it, but makes him guilty of an offense if he fails to do it, and in his report must make a statement of what is due to the clearing house or what he claims from the clearing house, and to this clearing house he sends all his transactions with reference to "rings," cancellations and settlement deals, showing thereon any amount that may be coming to him by virtue of his day's transactions, and from what persons or members, and what amount is coming from him to any members or persons; upon each clearing house sheet he strikes a balance, and if the difference is in his favor he asks a check; if the difference is against him he is required to close a check to settle the difference in the transactions.

What is the object and purpose of this clearing house system? Is it a system to further deliveries in any intended transactions in the future? Is it a system having for its purpose or object the furthering of deliveries? Does it say anything about, or having anything to do, with that subject? Nothing whatever, but is a system having for its object and purpose a means of cancelling all

possible transactions that can possibly be cancelled, and in fact, is the only business that the parties are engaged in. They are in a purely speculative cancellation business and in the business of settling differences only. A very simple process can be gone through for the small actual cash deals that are ever made.

On page 96 of the rules in force June 19, 1901, will be found the rules of the clearing house of the Board of Trade, which provides the system for enclosing checks for the net balances payable to the clearing house, and further providing that parties having no items to clear must so report in writing, and that parties whose reports are clear on both sides, as well as those who show a credit balance, must be put through the clearing house.

A clearing house sheet is submitted in the Record.

These "ring" deals constitute a part of the market quotations.

TRANSFER TRADES.

Another system which is in vogue on the Board of Trade, is what is known as the "transfer system." This is explained by Mr. Hough, on pages 467 to 469, of the Record; Mr. Crosby, on pages 737-738; Mr. Fox, page 798; and Mr. Kellogg, on page 903, Record.

This "transfer trade" is defined to be a system largely practiced between brokers in the pit, by which one buys from the other, a commodity for future delivery, and afterwards one of them arranges with the other to transfer the account to somebody else.

Mr. Hough, at the pages above cited, particularly describes this, and states that these transactions are very frequent in the pit and on the board, and that this transfer might involve a great many parties and might finally wind up by transferring the deal from one straight across to the other, and that this occurs where "rings" are not made. It does not happen in "ringing," because they do not like to break the "rings," but if the "ring" is not made up, they may settle by transferring directly from one to the other and thus settle the matter entirely between all parties concerned in the transaction. And he states that where a "ring" does not go

through, then they resort to the transfer system, and this is another extensive means of settling contracts and putting them out of existence, and this constitutes a part of the quotations.

SPREADS.

This is a class of deals made on the Board of Trade and is explained by Mr. Christie at pages 540 and 541. It consists of a spread between the markets in two different places, the buying of a commodity in one market and selling it in another. For instance, the party may buy a certain quantity of July wheat in Kansas City and sell the same quantity for the same delivery in Chicago, upon the theory that the usual relative conditions between the two markets for the same commodity may widen before the delivery time, and thus give the party a profit, and he close the deal out then by selling the same quantity in Chicago and buying the same quantity in Kansas City, and thus have a profit of the difference between the "spread" conditions and the difference that existed at the time of buying. This is resorted to, as shown by the testimony, largely among speculators in the pit, and it cannot certainly be said that there is any evident intention to deliver on any such transactions, or ever could be. The deal is made in the first instance by the speculative broker with the expectation that the difference only is to be the profit, and that is all that he is dealing in or expecting to accomplish. These transactions constitute a part of the market quotations.

DIRECT SETTLEMENTS.

There is another means practiced among the members, and that is known as "direct settlement," in which these transactions are gotten rid of without deliveries, mentioned by Mr. McHenry, on pages 581 and 582, and by Mr. Warren, on page 824, of the Record, and is described by Mr. McHenry as follows:

Q. Will you describe what a direct settlement is? A. I sell

the Master five thousand bushels of wheat for December delivery at seventy-two cents. I buy it back of him at seventy cents. If he agrees to the settlement of that contract, it is what is called a direct settlement, that is, if there is no objection on his part or mine, that is what is called a direct settlement.

Q. And you do what? A. It goes through the same method.

Q. They cancel both contracts and agree to pay each other the difference? A. Yes, sir; through the clearing house of the Board of Trade under its rules.

Mr. Warren, president of the Board of Trade, in referring to how the direct settlements are made, on page 824 of the Record, the following occurs:

Q. Now, how are they? Just tell how they are settled. A. Well, if I have bought from you five thousand bushels of wheat for May delivery, and sold it to Mr. Robbins, and Mr. Robbins has in turn sold it to you, we make an offset of those trades, and each one pays or receives, as the case may be, the difference, based on the selling price of the day.

These transactions constitute a part of the market quotations.

SCALPING.

Another large and extensive business carried on at the pits is known as the "scalping" business, which constitutes a part of the quotations sent out. This business is described by the following witnesses, at the following pages: Mr. Watson, pages 434, 435 and 438; Mr. Hough, pages 465 and 466; Mr. Boyd, pages 621 to 623; Mr. C. Crosby, pages 730 and 731; and Mr. Kellogg, pages 902 and 903.

We call attention particularly to Mr. Crosby's testimony, because he has been for a number of years a member of the Board of Trade and an extensive operator and expert. On page 730 of the Record, he says:

Q. Are there also such transactions there known as scalping? A. Scalping, yes, that is a term that is in use in the trade.

Q. Are scalpers members of the Board of Trade? A. Well,

it is a term that is likely applied—scalping is applied primarily to members of the board who stand in the wheat pit, for instance, and trade for their own account on small profits and small losses on the fluctuations in the market.

Q. That is to say, let's take the case of scalping and the scalper is operating in May wheat. How does he conduct his scalping operations? A. Well, the term scalping is applied primarily to those traders who stand in the pit and trade for an eighth or a sixteenth profit or loss, make a rapid turn in the market.

Q. Close out a trade as soon as they get a small profit? A. Yes, or a small loss, as quick in one way as in the other.

This scalping business is shown to be dealt in largely by members and a large number of the members are engaged in nothing else—do not even keep offices or places of business of any kind, but simply visit the pit from day to day and deal in the scalping business. In this business, of course, it cannot be contended that parties ever intend or even remotely expect that there will ever be any deliveries on their transactions. They don't make them for that purpose, but simply stand in the pit and buy or sell and go out by closing the deal on an eighth or a sixteenth of a cent profit, or closing it out at a slight loss, and go home at night with the entire business closed up, having, perhaps, during the day traded in hundreds of thousands of bushels of stuff, and when the market closes the entire business is settled.

These transactions constitute a part of the market quotations.

ARE THESE DEALS MADE WITH ANY REAL INTENTION OF MAKING DELIVERIES OF THE PROPERTY SOLD OR OF RECEIVING THE PROPERTY BOUGHT.

From the very nature of the transactions that we have heretofore described, it occurs to us that it rises to the degree of absurdity to imagine that it ever was intended or calculated that deliveries were at all contemplated, or that deals were made with any expectation that they would ever come about. This clearing

house system for clearing the trades of each day, this canceling and offsetting of deals, this "ringing" system, this sending to the clearing house of checks to settle the balances of future transactions and adjusting the differences in the trades and receiving from the clearing house a check next morning to settle such differences as would be in favor of the party reporting, and this elaborate system can mean nothing else than that its business consists principally and almost wholly of this speculative feature, a settlement of differences, leaving what little cash business that is done outside of the pits to take care of itself.

MR. FRENCH.

Now, as to whether deliveries are intended or expected on these transactions, let us refer to the testimony. First, the testimony of C. B. French, of Kansas City, who, from 1892 to 1899, dealt in grain options to the extent of over one hundred millions a year, and who sent his orders in this immense business to the members of the Board of Trade, Chicago, and who testifies that all this business was placed by members of the Board of Trade in the pits in buying and selling, and that all of his business was settled on differences, and that no deliveries were ever made by him, and that he never was asked to take or accept anything. We refer to pages 361, 362, 363 and 364-366, of the Record, found in the large bound volume. On pages 358 and 359 of the testimony, he states that he dealt in over one hundred million of bushels of wheat and grain and provisions a year, the principal part of it on the Chicago Board of Trade; that the orders were sent by him to members of the Board of Trade, and that they were executed on the floor by large speculative firms of M. S. Nichols & Company, Lamson Bros., Baldwin & Farnham, Swartz, Dupee, F. G. Logan and others. It may here be stated that these gentlemen are some of the largest speculators on the board. He states that his orders were nearly always by telegram; that his house was one of the first to use private wires in the country, and that he had a private wire for twelve or fifteen years from Kansas City to St. Louis, and part

of the time directly to Chicago. His testimony is too long to quote, but must be read to be understood. He states, on page 364, that all of these deals for all of the time were closed up by paying the profits and deducting from margins their losses. The following then occurs on page 364:

Q. Then the whole transactions were closed up by merely paying or receiving the difference in the market price? A. Yes, sir.

In speaking of the custom and practice on the Board of Trade, on page 366 of the Record, he says:

Q. What was the understanding of course of business with regard to that after making a purchase? What was the understanding of course of business as to closing that trade out? A. The understanding was that if we had ten thousand bushels of wheat bought from a Chicago house on the Board of Trade to-day, and we wanted to close it out tomorrow, we could do so and get our money, and that ended the transaction so far as we and they were concerned.

Q. Get what money? A. Get our profit, if we had a profit; or pay our loss, if we had a loss.

Q. And the profit or loss would be made up of what? A. Made up of the difference between the price at which we had bought and the price at which we had sold.

MR. KINNEY.

Mr. Kinney, located at Kansas City, who was the correspondent of Weare & Company, members of the Board of Trade, and several other large firms, has been in business some fourteen or fifteen years, and we call attention to his testimony on pages 380, 381, 382, 383, 385 and 388 of the Record.

On page 383 he states that his contracts on the Board of Trade were speculative trade and the buying and closing out or the selling and closing out of option trades without deliveries. That deliveries were never made and no payment made upon the commodity either way, and where the trade is closed out, no com-

modity is paid for, and that the trades in his transactions through the members of the Board of Trade were settled by settling the differences between the purchase and the selling price.

On page 385 he states that in all his transactions for future delivery that a very small per cent, possibly one-tenth of one per cent, was ever delivered, and that he had transactions on the Board of Trade for fifteen years, and every day; and on page 385, that he had done business on the Board of Trade in this way for a year at a time without ever making any deliveries at all; on page 388 he testifies that he never had any understanding about carrying the stuff until delivery day, but his understanding was that he could sell it out, or buy it in and settle up by settling the difference. On page 388 he states that he had large dealings on his own account with members of the Board of Trade, and that in them, nothing was ever delivered, but they were closed out on the differences.

This gentleman was a member of the Board of Trade of Chicago when he was dealing in this business, and so testifies at page 388.

MR. WATSON.

Mr. Watson, on page 423 of the Record, states:

Q. Now, as a rule, what do they do with those transactions? A. As soon as possible they are settled.

Q. Settled by——? A. By ring.

* * * * *

On page 434 he testifies:

Q. Among that class of men that deal there at the pits, do you know how many of them there are that close up their deals every night? A. No, I don't. Quite a number.

Q. Quite a number? Those who close up their deals every night, how do they do it? While at the pits they are buying something for future delivery all the time. A. They buy and sell the same amount each day.

Q. Then what do they get out of the trades? A. Settle up.

WALTER C. HOUGH.

Mr. Hough was a member of the Board of Trade from 1875 to 1900, and did business all the time on the Board of Trade, and at pages 459 and 460 of the Record, he states:

Q. In what manner do they usually close up their trades there? A. Shall I answer the question? By settlement, rings, as I said before, going through the clearing house.

Q. Do you know what proportion of the deals at the pits which are deals for future deliveries of commodity are closed up by rings, and what proportion are closed up in any other way? A. Well, of course, I would know more about my own business and the people I worked for than I would of the general run of the floor, but you asked me how much of the transactions are settled, and what is delivered through the clearing house, and I would say it was very nearly all, possibly there wouldn't be one per cent of the stuff delivered as cash, as of the trade.

Q. Nearly all of it closed out by rings and through the clearing house, isn't it? A. Yes, sir.

JAMES B. HETH,

of Chicago, was a member of the Board of Trade for twelve years; joined the board when he was twenty-one years of age; became a member in 1888; was a member of the old firm of Heth & Son on the board. On page 505 of the Record he testifies as follows:

Q. Were those dealings that you conducted for your own house dealings in future or in cash commodities? A. Future, sir.

Q. In the dealings that you had in futures, how were those transactions closed out? A. Settled by rings, settled.

Q. Were any of them settled by actual delivery of the stuff and payment for it? A. None that I ever knew of, sir.

Q. And how many years did you do business on the floor of the exchange room for Heth & Son? A. Five or six years.

And on page 501 the following questions and answers:

Q. And in that trading, covering a period of five years, in wheat, you never received or delivered anything? A. I don't believe we ever paid for one cash wheat, sir.

Q. And if you didn't pay for it, you didn't receive it? A. Not to my knowledge.

CHARLES K. NIMS.

A resident of Chicago and a member of the Board of Trade and has been for ten years. At page 496 of the Record, he testifies:

Q. State whether any of these customers in the beginning of their transactions had told you that they did not want any of the commodities, that they merely wanted the profit that was in it? A. Well, there wasn't anything said in reference to that matter.

Q. Did any of them receive and pay for any of the stuff that was bought on their order? A. They did not.

Q. Did any one of them deliver any of the stuff that was sold on their orders? A. No, sir.

And on page 497, the following:

Q. Now, in that two millions of stuff that was traded in, that was all traded in at the Board of Trade, was it? A. Yes, sir.

Q. In that two millions of stuff, how much was delivered? A. None; it was sold out.

Q. How much was paid for? A. None.

And on pages 497 and 498:

Q. Did you deal in five thousand bushels or five million? A. Oh, I dealt in hundreds of thousands of stuff, I don't know how much.

Q. And in that hundreds of thousands that was dealt in in 1900, how much of that was delivered? A. None.

Q. The year before that was the business done for you, or by you, or for your customers, large or small? A. Fairly large.

Q. Amounting to how much, would you say? A. I cannot say; hundreds of thousands of stuff.

Q. And in that lot, in 1899, how much was delivered? A. My stuff was sold out before the option matured. There wasn't any delivery connected with it.

Q. No delivery at all? A. No, sir.

Q. Now, take the year before that, was your business large or small? A. I could answer just the same.

Q. Was there anything delivered there to you? A. No, sir.

Q. And the year before that was the business large or small? A. The same, no delivery.

C. C. CHRISTIE.

One of the defendants and a dealer of Kansas City, who has dealt largely and still is dealing largely through members of the Board of Trade of Chicago. Mr. Christie describes the nature of the transactions at pages 516 and 517, as appears from the following:

Q. Commence with the initial order and go through the whole process until that order is closed out and settled. A. Well, suppose I send Logan an order to buy twenty-five thousand bushels of May wheat: The telegram I would send him would read, "Buy twenty-five May wheat." If I wished it bought at a limit price, the message would so state. If there was no limit on the message, Mr. Logan would send his broker into the pit to buy twenty-five thousand bushels of wheat at the market and telegraph me, his message reading, "Bought twenty-five thousand bushels May wheat at" whatever price he paid for it. Then, when I closed that trade, I would send Logan an order reading, "Sell twenty-five thousand bushels May wheat," and Mr. Logan would repeat the same process, send his broker into the pit to sell twenty-five thousand bushels of May wheat, and would report that sale to me by wire, have his bookkeeper make me up an account purchase and sale of that transaction, charging me the loss in the price, if there was one, a commission, and the government war tax, and debiting my account with this amount of money; or in the event that the transaction had resulted in a profit, my account would receive a corresponding credit.

Q. Then, after you got the credit, what further have you, as a customer, to do with the transaction on the Board of Trade? A. Nothing whatever.

Q. Do you know, according to the practice of the Board of Trade, what becomes of those two transactions that Logan had there on your account? A. Yes, sir; they are kept open on Mr. Logan's books until some counter-trades that he makes with members of the board enable them to form a ring, and as soon as a ring can be formed, they are rung out and settled by paying the difference between the prices bought and sold through the clearing house.

At page 518, the following:

Q. Will you state what the practice is as to closing up those deals? A. Through the clearing house.

Q. Yes? A. Every member who has any trades they are ready to settle through the clearing house is obliged to fill out a sheet, which is called the clearing house sheet, claiming from one member and crediting to another, and the differences that are due or coming to him, and any items that are cleared this way for his account, and he is obligated to send this sheet to the clearing house with a check to pay the difference, if he owes money, or a claim on the clearing house for the balance if one is coming to him, and the transaction is cleared and closed up.

WM. E. McHENRY.

One of the large and extensive dealers on the Board of Trade, and lived in Chicago thirty-eight years. Has been an operator on the Board of Trade since 1867; was a member of the old firm of Lake & McHenry; afterwards did business on his own account, his transactions running as high at times as five million bushels in a single day. On page 578 of the Record, the following occurs:

Q. Now, we will come to the ninety-five per cent of transactions; how were they closed? A. They were closed under the rules of the Board of Trade by a system adopted under those rules of what are called settlements.

Q. On rings? A. Settlements on rings, yes, sir.

Q. And closing out through the Board of Trade clearing house? A. Yes, sir.

JAMES E. BOYD.

Ex-governor of the State of Nebraska and now residing at Omaha, but prior to that time was for four years on the Board of Trade of Chicago, and a member of the board, and at the head of the firm of Boyd, Paxton & Boyd, and did the third largest speculative business on the board, and dealt in as high as four to five million bushels a day. On page 610, the following occurs:

Q. Then in all of these trades rung up, there was no delivery of the commodity and no payment for it? A. No delivery, certainly; no; none whatever.

Q. Well, was there payment for it? A. No, sir; no payment for it; it was a payment of differences.

Q. What proportion of your business on the Board of Trade resulted in having the deals rung up and settled by a mere payment of differences in market values, and what proportion resulted in actual delivery and payment for the commodity? A. Well, that would be a pretty hard question for me to answer what proportion, because we are not a receiving house, we had no elevators or anything of that kind; we only received when it was absolutely necessary. We tried to avoid receiving or delivering as much as possible, because of the expense attending it, and that is why we wanted these trades rung up.

W. S. CROSBY.

For thirty-six years a resident of Chicago and in the grain business ever since he came there; been connected with two or three of the large commission houses of Chicago, and then in business afterwards for fifteen years by himself, in the commission business on the Board of Trade. He states that his deals on the board would run up into a million bushels a day, sometimes as low as a hun-

dred thousand. On pages 714 and 715, of the Record, he describes the manner of doing business, showing that when a customer sends in his order, the purchase or sale is made and posted to the customer's account, and when they get an order to close that deal, they go on the floor and make a sale and enter that in his account. Then, after that is done, an account of purchase and sale is rendered, and a statement showing the profit or loss, whichever there may be. On page 715 he answers as follows:

A. Why, we render him an account purchase and sale of these two transactions, after charging him the commission agreed upon and the tax and other charges, if there be any. We credit his account or charge his account with the profit or the loss.

Q. And if he wanted to close the transaction with you and he had made a profit, would you send him a check? A. Yes, sir.

Q. And the amount of that check would be the amount of the profit which would result from the difference in the two market prices after deducting your commission, and at present, the revenue tax, wouldn't it? A. Yes, sir.

AUSTIN WRIGHT.

Popularly known as "Charley" Wright. One of the most popular continuous and extensive dealers of the Board of Trade of Chicago. A resident of Chicago for thirty-three years, a member of the Board of Trade for twenty years, and has dealt on the Board of Trade for thirty years, and in the pit for over twenty years. He states that there is no difference in the manner of settling these transactions now on the Board of Trade than there was when he first commenced, except in the matter of detail, except that they have of late years established a clearing house and a system of notices. At pages 784 and 785, the following appears:

Q. How extensive were your dealings as a speculator? A. Very large.

Q. What do you mean by very large? Can you fix it by the day, week, month, or year? A. Well, I don't trade every day; I

buy or sell a great big line of stuff and then stay with it until I get tired or satisfied, and then get out.

Q. And the stuff that you buy or sell is generally for future option? A. Yes, sir.

Q. Was it always for future option? A. Yes, sir.

Q. How were those transactions in future options, as a rule, closed? Were they closed before the day of delivery arrived? A. Not always.

MR. JENKS: Yes, read the question.

Q. That is as a rule? A. As a rule, they were.

Q. What proportion of those transactions were closed before delivery? A. Nearly all of them.

Q. Can you give us a per cent of the transaction that resulted in delivery to you and payment for the commodity? A. No, I cannot. I never paid for any stuff but three times, I think; three or four times.

Q. Three or four times? A. Yes, sir.

Q. In thirty years? A. Yes, sir.

Q. During the past year, have you been dealing any? A. Yes, sir.

Q. And during that time, how much stuff have you received, delivered and paid for? A. None.

Q. And during the year before, you were dealing then? A. Yes.

Q. During that time, how much stuff did you receive, pay for and deliver? A. Not any.

Q. During the year before that, how was it? A. I paid for none.

Q. How was it the year before? A. I have not paid for any stuff since 1892.

On page 786, he states that he occasionally traded in a half million or a million bushels of wheat or corn. The following question was then put to him:

Q. At the time of transaction in those commodities on the floor of the exchange room of the Board of Trade, what was your intention as to receiving and paying for that stuff? A. I had

no intention of either receiving or paying for it unless it was to my advantage to do so.

* * * * *

Q. And take that same broker that you operated through quite frequently, did he ever deliver anything to you or call upon you to deliver anything to anybody else? A. No, sir.

Q. Did he call upon you to pay anything but the difference in market price? A. That is all.

WM. J. FOX.

A resident of the City of St. Louis, and formerly lived in Chicago for twenty-two years, and was a clerk in Board of Trade houses on the Chicago Board of Trade for Walker & Company, McClain Bros. & Company, R. G. Merrill and R. G. Zorge, some of them commission firms and some of them scalpers on the market. He defines a scalper as being a member who trades on his own account. On page 798, the following occurs:

Q. How did they close those trades up that were made at the pits, do you know? A. Transfer or settle.

Q. How was that transfer accomplished? A. Down on the exchange floor, go down and give two different parties each other's names.

Q. And then the transfer would be made? How would that affect the orginal party, Merrill or Zorge? What would be their position in the trade after that transfer? A. He would not have the trade at all.

He then states that Merrill and Zorge dealt on the board to the extent of a half million bushels a day on each side in wheat.

The following question, on page 799 of the Record, was then put:

Q. In the whole bulk of dealings that they had there, what proportion resulted in actual delivery and payment of the stuff? A. On the payment of the stuff?

Q. Yes? A. I remember only one case. (Which he then states was only five thousand bushels of wheat.)

The following important testimony from this clerk, who had charge of ringing and settling business as clerk, and who, from day to day, met clerks of other houses in settling their deals, is especially called to the Court's attention, on pages 799 and 800 of the Record:

Q. And as a clerk, what part of the business did you have to attend to? A. Taking care of trades in the option book, the clearing house sheet, ring book.

Q. Were you in a position so that you could know how the trades made by them were closed, whether by ringing up or by delivery? A. Yes, sir.

Q. As a rule, how were they settled? A. Settled by ringing them up.

Q. What proportion of their deals resulted in deliveries while you were there, I mean their transactions on the Board of Trade? A. About one per cent, I should say.

WM. S. WARREN.

Mr. Warren is president of the Board of Trade and is a member of a commission firm engaged in business at the pits, engaged in actual grain handling and in speculative business at the pits. On pages 824 to 827, the following occurs from his testimony:

Q. Yes, but I asked you if you knew of your own knowledge, and I asked you that because you answered once that you didn't know of your own knowledge. What has the settling price to do with your ringing up deals? A. The payment of differences is based upon the settling price.

Q. How is it based upon the settling price? A. Through the clearing house.

* * * * *

A. I know, in a general way, that these differences are adjusted by the settling clerks every day upon the settlement price posted upon the exchange.

Q. Yes? A. And that the differences are adjusted through the clearing house.

Q. How does there happen to be anything due or payable? A. The differences, the payments arise out of the difference in price between the purchases and the sales which you have passed through—which have been settled during the day.

* * * * *

Q. Now, how are they; just tell us how they are settled? A. Well, if I have bought of you five thousand bushels of wheat for May delivery, and sold it to Mr. Robbins, and Mr. Robbins has in turn sold it to you, we make an offset of those trades, and each one pays or receives, as the case may be, the difference, based on the settling price of the day.

Q. And we will say the initial transaction was to-day and the closing out of the whole business was tomorrow, and this deal was a purchase for May delivery, then that whole business would have been conducted from beginning to end and settled on the mere difference in the market price, wouldn't it? A. Yes, sir.

Q. *And all the members of the board conduct their business in the same way where the trades are the same as you have just described, I mean where the customers give the same sort of orders and you are able to make the ring in the same way?* A. *Every member of the board, Mr. Jenks?*

Q. *Yes, all of them who do that kind of business, do they do it in the same way?* A. *That is the general course of business,* yes, sir.

WALTER COMSTOCK.

A commission merchant on the Board of Trade, and connected with one of the largest firms in Chicago, Schwartz, Dupee & Company; a member of the Board of Trade, and has been since January, 1900, when he went into the firm. Every member of the firm of Schwartz, Dupee & Company are members of the Board of Trade; that firm, like all other large speculators on the board, have settling clerks, ringing clerks, settling books, option books and option ledgers. He testifies that the firm dealt in an average of a million bushels of wheat a day.

On page 900 of the Record, the following occurs:

Q. And if you had such a customer who had been with you for years and had a lot of transactions, and never did receive or deliver anything, would that be any indication to you as to whether he intended to receive or deliver anything? A. Well, he might the next time.

Q. O, he might, but it would be pretty good guessing? A. That is as close as I can come to it.

Q. It would be pretty good guessing that he didn't want it; he merely wanted the money that was in it, wouldn't it? A. Well, I have had them trade for quite awhile and then finally take in cash stuff.

Q. Yes, but it was because they got stuck, wasn't it? A. No, sir.

Q. Because they could not get out? A. No, they may have thought it would go to a premium and would want to hold it.

Q. But as a rule, they don't take anything, it is pretty good guessing that they don't want it? A. If they don't take anything, yes.

We have taken the above from the testimony of all of the witnesses who have testified on the trial of this case to show how these members of the Board of Trade, and the parties who have been dealing there for years, understand the practice and custom. On last April, since the O'Dell case was tried, Mr. Robbins, for the Board of Trade, undertook to take some more testimony, and put on what he called "cash dealers" of grain, and among the cash dealers is the gentleman, Mr. Frank B. Rice, the miller, whom we have heretofore referred to, who, in effect, defined that he never intended to deliver anything on his hedge deals, which were the only kind he made, unless there was an abnormal condition in the market; that is, unless the unexpected happened.

They put upon the stand Mr. Geo. E. Marcy, of Armour & Company, who is one of the largest cash grain buyers, perhaps, in the world, and this man testified that he is a handler of cash grain throughout the country; went on the Board of Trade and made hedging deals, and then admitted that in all hedging deals that they made he did not deliver over ten million a year of the

fifty or more million of bushels dealt in, and attention is invited to the testimony of these so-called cash dealers for the purpose of showing that only two of them undertake to make any estimates of the per cent of deliveries made on their hedging deals. These two men are Mr. Marcey, of Armour & Company, and Chas. A. Weare, of the Weare Commission Company; and Mr. Weare, the representative of one of the largest so-called cash houses in the country, admitted that in all their hedging deals they did not deliver over three per cent, as it appears, commencing on page 194 of the Record, and stated that one per cent of all their hedging deals resulted in ringing up and settling through the clearing house under the regulations of the Board of Trade.

After this witness had gone off the stand he asked to come back and correct his testimony, and did so by correcting it so as to say that he had delivered about three per cent of his hedging deals, and that he had closed out through the clearing house by rings, ninety-seven per cent.

These are the only two gentlemen of the so-called cash dealers who made any estimates of the amount delivered, or that would do so, or tried to do so, all others seeking to evade it, except Mr. Rice, the miller, who candidly admits that he did not intend nor expect to make deliveries on his hedging deals unless some abnormal conditions in the market arose.

The testimony of C. C. Christie, commencing on page 515, and of Wm. S. Crosby, commencing on page 701, give a correct history of all this speculative business.

PER CENT. OF DELIVERIES.

We now desire to give to the Court a statement of the various witnesses, that went upon the stand, as to the percentage of deliveries and we will try to take them in their order:

C. D. FRENCH, who has been dealing for twenty-five years through members of the Chicago Board of Trade, dealt in millions of bushels, at page 366 of the Record, puts the estimate of de-

liveries on these future transactions at one-two-hundredths of one per cent (1-200 of 1 per cent).

MR. KINNEY, a dealer for fifteen years on the Board of Trade, at page 385, puts the estimate at one-tenth of one per cent (1-10 of 1 per cent), possibly *one* per cent.

MR. HOUGH, a member of the Board of Trade for many years, at page 460, puts it at one per cent (1 per cent).

MR. HETH, a member of the Board of Trade, at page 509, puts it at five thousand bushels out of five or ten million.

MR. McHENRY, one of the members and long-time dealers on the Board of Trade, on pages 577, puts it at about five per cent (5 per cent).

MR. BOYD, at one time a member of one of the three largest houses in Chicago, and a dealer in millions of bushels a day, at page 610, puts it at one-half of one per cent (½ of 1 per cent).

MR. CROSBY, representative of some of the largest houses in Chicago on the Board of Trade and for years a member thereof, at page 719, puts it at one per cent (1 per cent), or in other words, he says that "ninety-nine per cent is rung up and settled before delivery day."

MR. WRIGHT, one of the largest dealers in and on the Board of Trade at Chicago, popularly known as "Charley" Wright, at page 785, states that he dealt in millions of bushels and never delivered any in all his career, except three times, that is to say, three or four times in thirty years, and hasn't made a delivery since 1892.

MR. FOX, a clerk at different times in four of the largest houses on the Chicago Board of Trade, who dealt in millions of bushels, at page 799, says that he never knew of but one case of which a delivery was made and that was only five thousand bushels of wheat. Therefore, his per cent of average is so small that figures could hardly express it; but finally, at page 800, he estimates it at one-tenth of one per cent (1-10 of 1 per cent).

MR. COMSTOCK, of the firm of Schwartz, Dupee & Co., one of the largest, if not the largest, house in Chicago in its line, at pages 897 and 898, puts his estimate at one to two per cent (1 to 2 per cent), or, in other words, ninety-nine or ninety-eight

per cent of all the deals of their house were settled on differences without delivery of anything, and they dealt at times in as high as five million bushels a day.

MR. WEARE, of the Weare Commission Company, one of the so-called cash houses, and one of the large institutions of Chicago, at page 171 testifies, on all of their deals in the pit which were hedging deals, ninety-nine of them resulted in ringing up, leaving one per cent (1 per cent) only of deliveries. He afterwards went back on the stand, page 194, and raised the estimate to three per cent (3 per cent).

MR. WARREN, president of the Board of Trade of Chicago, who does both a cash and a speculative business, states, at page 828, that he deals in from fifty to sixty-five millions a year at the pits in futures, and he testifies at page 830 of the bound testimony, that for the delivery month of the month in which the testimony was taken, they did not pay for anything.

On page 870 of the Record he states that during the year 1901, his house dealt in, speculative and purchases, to the extent of seventy-five million, four hundred and forty thousand (75,440,000) bushels, and that the total amount of the actual delivery by warehouse receipts on these seventy-five million, was only three million, one hundred and forty-five thousand (3,145,000); this would make about four per cent (4 per cent).

In this connection it is important to call attention to the testimony of Mr. Warren, found commencing on page 885 of the Record, wherein the following takes place:

Q. If the bucket shops are closed, is the business of the Board of Trade increased because the persons who deal at the bucket shops would deal on the Board of Trade through its members? A. Yes, sir.

This is the most convincing testimony of all, if there was any doubt at all about the nature of their purpose. Here is the president of the Board of Trade condemning so-called bucket shops throughout the country and seeking to enjoin them from doing business on the ground that they are gambling, and then admitting on the stand that the result of closing them up would be to send the business to the members of the Board of Trade. It may be

asked, what kind of business? Simply this speculative business, which is the business carried on at the pits, and from which result the quotations in question.

And in the same line attention is also called to pages 526 to 529 of the Record, where a conversation took place between Mr. Warren, the president of the Board of Trade, and Mr. Christie, in which the true spirit of the Board of Trade's position is disclosed. In that conversation Mr. Christie was asking for the quotations and Mr. Warren refused to allow Mr. Christie to have them unless he, Christie, would agree that every order he got would be placed on the Board of Trade, and that the bucket shops either had to quit or that the Board of Trade had to quit.

Here is a remarkable situation indeed. The president of this great Board of Trade contending that it is not engaged in bucket shopping itself, and contending that defendants were, and then, offering to agree with Mr. Christie that if he would turn that business of his over to the members of the Board of Trade of Chicago, and allow it to be done through them, that he might have the quotations. This is certainly the strongest proof of the duplicity, insincerity and falsity of the position of the Board of Trade, and Mr. Christie, in answer to that suggestion, made the following reply: "That is a remarkable statement. Do you mean to say that if all the men who bet on these markets outside of the Board of Trade should quit, that there would be no more markets for grain in Chicago?"

And Mr. Warren's answer: "Oh, no; there would be a casn market for grain."

And Mr. Christie then said, "Would not that market be there forever?"

And Mr. Warren replied, "Yes, that would be true, but there would be sixty men upon this floor, could do all of that business, and there were two thousand members of this Board of Trade trying to make a living."

What does this mean? An admission of the president of this board that sixty men could do the little cash business around the sides of the hall, but that the two thousand members of the Board of Trade who were trying to make a living, would have

to do what? Would have to quit, of course, because of the fact that they were dealing in speculative business exclusively. These men that were dealing in the futures and speculating from day to day, were the ones that he was looking after. And this conversation shows that Mr. Warren's motive, and the motives of the Board of Trade, was an effort to procure all the so-called bucket shops in the country, if possible, to place all their deals through the Board of Trade, and if they would do so, then, of course, they would not be bucket shopping, in the opinion of the Board of Trade of Chicago.

But, it must not be forgotten, that even this small percentage of deliveries that are above mentioned, to-wit, an average of perhaps one and one-half (1½ per cent) per cent, are really not deliveries at all, and never were. The Board of Trade has a system which they call a "delivery notice" system, which system consists of one party taking a notice that he has, for instance, five thousand bushels of wheat to deliver on delivery day and hands it to B, and B to C, and C to D, and thus down the entire line until they reach X, and X, on the other hand, if he has nobody to give it to, and cannot dispose of it, may have to finally take it and pay for it. They call the handling of this notice from one to another as a delivery, but as a matter of fact the testimony shows that there is no delivery made from one to the other, but they simply settle and adjust the differences through the clearing house, and this is the way a large portion of even this small per cent of deliveries is made, so that when the matter is run down to the last analysis, it absolutely fades away, and presents the most gigantic scheme and system of gambling in futures that has ever existed, and upon these gambling transactions alone is founded the quotations which the complainant seeks to enjoin the defendants from having and using. The market quotations arise from nothing else than deals known as "rings," "stop order," "hedges," "transfer trades," "spreads," "direct settlements," and "scalping," and from deals only that are for the future, purely speculative in character, with the expectation of closing all of them without any deliveries.

Our position is, that the Court will find from this testimony

that the complainants are violating the law and do not come into Court with clean hands themselves, and for that reason have no standing in equity, and we call your attention to the following leading authorities upon that proposition:

Board of Trade v. O'Dell Com. Co., 115 Fed. 574.
110 Federal, 689, *Del. R. R. Co. v. Frank.*
80 Federal, 896, *Heilson v. Foster.*
144 Ind., 86, *Lynch v. Rosenthal.*
43 Kansas, 404, *Water Sup. Co. v. City of Potwin.*
94 Ill. App. 229, *Christie v. Board of Trade.*

(94 Ill. App., 229). At page 236 that Court says what we now say of this case:

> "If it could be said that there appeared to have been a use, slight and comparatively insignificant in extent, for purposes other than gambling, still the conclusion would be unaffected that the regular and substantial business of appellant for which the quotations were sought, was an illegal business. In a court of equity, the pretext could not be permitted to hide the substance."

How aptly that medicine fits this case where the Board of Trade is now undertaking to ask a court of equity to do something for it. Here the deliveries are *so slight and comparatively insignificant in extent for purposes other than gambling that the conclusion is unaffected that the regular and substantial business of the Board of Trade in their pits,*—and from which quotations arise and which they seek to enjoin the defendants from using—emanate, is illegally carried on and permitted to be carried on, by the Board of Trade, that in a court of equity *the pretext cannot be permitted to hide the substance.*

The evidence here conclusively shows that the per cent of deliveries that ever result from these speculative and future deals, are so slight and insignificant that in our judgment no court could be justified in saying that they ever expected or honestly intended to make deliveries thereunder, or receive deliveries in such transactions, and indeed the entire system demonstrates conclusively that such is not the intention and is not the fact and cannot be, while

a large amount of actual grain commodities are handled each and every year, and while much cash grain may be sold on the sides and around the edges of the exchange hall, yet this business has nothing whatever to do with the speculative feature, and in this speculative business the evidence has put at rest any possible justification for the claim that deliveries are intended.

We here desire to state what was stated on the oral argument: *"If the complainants were here in this Court trying to prove that they did not intend to deliver, this Court would certainly be justified in saying that inasmuch as we find from ninety-seven to ninety-nine per cent of these speculative trades are settled up and rung out by the settlements of differences, we will hold your contention to be true; and, therefore, we say as the reverse of it, that inasmuch as only one to three per cent is ever delivered, the Court should find that it is not their intention to deliver."*

Let us here again recall a few evidential facts and illustrations from the testimony in this case:

After the Chicago Board of Trade was organized it was not long before they discovered that the making of contracts for future delivery was an impossibility unless they found some means of canceling these contracts, as it would be an utter impossibility to keep track of and make deliveries of the immense amount of grain both bought and sold for future delivery, and the first thing they did was that each house doing business on the Board of Trade employed clerks whose business it was to run around among the other brokers with whom they did business and cancel as many of these trades as they could. After a time one bright fellow proposed a scheme which they called a "ring," and which was immediately adopted, and then for a number of years as fast as the trades got into such a position that they could be "rung," they were made up in the various offices, and there were employed hundreds of men called "settling clerks" whose business it was to go around each morning and collect differences from all firms who owed a difference on trades that were "rung" up the day before to the houses such clerks were employed by. This necessitated the employment of a large additional force and the writing of innumerable checks by each and every broker who did any consid-

erable business on the Board of Trade. In the course of time another bright fellow proposed a clearing house, which was afterwards adopted and which is now in force, and which is probably the most complete piece of machinery for canceling contracts that was ever invented, as it performs the service every day of canceling *all* the contracts that it takes the combined trading force of *all* the brokers engaged in business on the Chicago Board of Trade *all* the previous day to make.

In the early history of these transactions it was never pretended that the delivery on these future contracts was anticipated or contemplated, and it was not until after the courts began to say that all of these Board of Trade contracts were bets that the board even made the declaration that it was their *intention* to receive and deliver. It was not until the board discovered that bucket shops were very immoral and engaged in a most vicious species of gambling, and that it was their special duty to suppress such gambling, that they had any rules preventing members of their board from trading with the public in exactly the same manner as do the bucket shops all over the United States, and all members of the Board of Trade *did* business with the public in the manner above described to a greater or less extent. In explanation of this, any member of the board was allowed to trade direct with his customers or with the public, buying or selling the property themselves, and allowed to cross trades in their own offices, crossing trades meaning that if they had an order from one man to buy and from another man to sell the same property for the same delivery, they would put these two trades down to these two men without any transactions on the Board of Trade. They have now made, however, stringent rules against this sort of thing since they have discovered the great iniquity there is in this kind of trading, because it was popular with bucket shops. The truth remains however, that it would be an impossibility to do this business making contracts for future delivery in any other manner than what was originally the purpose and intention of the Chicago Board of Trade, and their contracts to-day are intrinsically the same as they were before these great reforms on the board were instituted, and of necessity cannot be changed, and the whole sys-

tem of the Chicago Board of Trade to-day, outside of the very small part of it which is devoted to the handling of actual grain, is simply a great big piece of commercial machinery, highly evolved and elaborated, for the purpose of making contracts and canceling them without being obliged to receive or deliver any grain on these contracts, and it is a fact beyond controversy that a man may trade on the Chicago Board of Trade his whole life long and never be asked to receive or deliver a bushel of any kind of grain by simply transferring his contracts from *one* month to another as they near the time of delivery.

The grain crop of the year 1901, as per government official report, was:

Wheat	721,318,000	bushels
Corn	1,359,354,000	bushels
Oats	659,498,000	bushels
Barley	70,000,000	bushels
Rye	23,598,378	bushels
Making a total of	2,833,768,378	bushels

of grain raised in the United States last year.

The Chicago Board of Trade during the year 1901 had 300 business days. Assuming that each member represented a trading business of 25,000 bushels per day (and this estimate is extremely light, as your honors must determine by reading the evidence of the amounts traded in by various houses), it would make a total amount traded in during the year for future delivery of fifteen *billions* of bushels, or over five times the total crop of the United States. This statement alone is sufficient to show the absurdity of the claim that it was the intention of the parties to these contracts to make deliveries when such contracts were entered into. It would have required an elevator capacity to handle this grain of ten times that now in Chicago, and it would require a clerical force in the offices of the members of the Board of Trade almost ten times greater than they have at present, and aside from this it would simply have been impossible for these houses to have kept track of these contracts and received and delivered them at maturity. The business would have to be done on differ-

ent lines and different methods to handle any such amount of property if the actual grain were delivered and received on contracts. This is the first proposition. The next one is that not all the railroads in the United States that run into Chicago could have handled their other business and brought this quantity of grain to Chicago, had it been available, while in truth if every bushel of grain that was raised in the United States had gone through Chicago, it would have been necessary to have handled it five times over in order to make these deliveries. The testimony shows that during the last year (and including a corner in May corn, when prices were inflated to an unnatural degree and unusual deliveries were made on May contracts) not to exceed forty million bushels were delivered during the whole year on contracts made in the pits on the Chicago Board of Trade for future delivery.

To make clearer this system of grain business as done by what the Board of Trade calls "cash houses," which includes elevator owners, corn cribbers, millers, and men engaged in shipping cash grain, the evidence shows that the almost universal custom is to buy this cash grain all over the West, and as fast as they buy it, protect it by what they term a "hedging" sale on the Board of Trade, this hedging sale serving for them a double purpose in that it secures to them the profit that they have made between the market value of the cash property they have just bought and the price they paid for it, and in securing them against any loss that might occur to them through their owning this cash property should the market decline. In the case of elevator men who do a storage business, the hedging sale also performs another service, namely, enabling them to make the carrying charges on the grain in store. Illustrating this, the price of cash wheat yesterday in Chicago, that is No. 2 spring wheat, contract grade, was 75½c, while the July price sold at an average of 77c during the session, making the difference between the value of cash and value of wheat for July delivery 1½c. Assuming that the elevator people bought this wheat yesterday in the country at one cent under the cash market value of it and sold it for July at 1½c over the cash value of it, this shows a carrying charge, or elevator profit, of 2½c per bushel to carry the grain from now until July. It would be a

reasonable proposition to assume that the elevators would constantly make this transaction, and then when July gets here (the same conditions obtain between July and the future month that obtain between the present and July at this time). The elevator man will not deliver his wheat on this July contract, but he will buy in his July contract and sell September wheat, which at that time will again be a premium of 1½c to 2c per bushel over the cash price on July 1st. If at any time between these deliveries he gets an offer for export, or from mills, which shows him a better profit to part with his wheat than to carry it in the elevator, he will sell it and buy in the short sale on the board. This same proposition is true of corn and oats, and that it must be true we again call your attention to the fact that *if the price of grain in the pits* in Chicago was as *good* a market to *sell on* as the country usually affords, the result must be that grain would *never get beyond Chicago.* It would simply pile up in the elevators there, as no grain handler would bother with shipping, railroad rates, and the thousand and one annoyances that are connected with this business, unless by so doing he could get a larger profit out of the business, which, of course, means a higher price at which they sold their property than they could obtain by delivering it on a Board of Trade contract. This proposition is unquestionably true, and consideration and investigation of the testimony will convince that no other proposition regarding the business could be true, as the business could not be carried on from month to month and from year to year except on conditions as above outlined.

The above explanation clearly shows that the intention on the part of these grain men with their hedged trades is not to deliver on these hedged contracts, and their intention cannot be to deliver when the trade is made for the reasons above stated, and the only time they do deliver on these contracts is when the market gets into an abnormal condition, when somebody on the Board of Trade is engaged in another illegal business, namely, the attempt to corner the market by which prices are inflated in this particular place to an unnatural and unusual extent, and only then does the testimony show that any considerable amount of grain is ever de-

livered on these contracts. The report of the secretary of the Board of Trade, filed as an exhibit, shows that there went through Chicago last year two hundred and forty-five million bushels of grain, and there is no evidence anywhere to show that forty million bushels of it was ever received or delivered on contracts made for future delivery on the Chicago Board of Trade.

The Chicago Board of Trade issued a statement showing that there was received in Chicago during the year 1901:

Wheat	51,197,870 bushels
Corn	84,163,637 bushels
Oats	90,632,152 bushels
Rye	3,244,324 bushels
Barley	15,996,670 bushels
Making a total of	245,234,653 bushels

of grain that was received and sent into consumption through Chicago. The testimony shows that they *sold nearly seven times as much* grain on the Chicago Board of Trade as was raised in the whole United States, that they delivered on these contracts *not to exceed forty million bushels* and that of the cash grain that went into Chicago during this time, *not one-sixth* of it was ever delivered on future contracts made by the Board of Trade."

"Another interesting fact is shown, that while these enormous amounts are constantly traded in for future delivery on the Board of Trade, that even the actual grain that is handled through Chicago amounts to less than the total crop of either of the States that are immediately tributary to Chicago and are, of course, the Board of Trade's biggest customers. Iowa raised in 1901:

Corn	209,250,000 bushels
Wheat	18,925,000 bushels
Rye	1,662,035 bushels
Oats	108,710,000 bushels
Barley	9,832,958 bushels
Making a total of	348,385,993 bushels

for the Iowa grain crops, or over one hundred million more than the total receipts of grain at Chicago during the same time, and three hundred million bushels more than the actual deliveries of grain made on future contracts on the Chicago Board of Trade.

"Illinois raised in 1901,

Corn	155,926,000 bushels
Oats	93,229,000 bushels
Wheat	26,701,000 bushels
Rye	1,268,472 bushels
Barley	330,550 bushels
Making a total of	277,455,022 bushels

of all kinds of grain, and thirty-two million more than was received in Chicago, and two hundred and thirty million more than was delivered on contracts for future delivery on the Chicago Board of Trade."

In view of these facts and these statistics, is it not an absurdity for the complainants to say that these contracts are made with an intention to deliver when, from the character of the business done, it is absolutely an impossibility that such deliveries should be made, and it is a fact that no provision whatever in either the elevator capacity nor the methods of doing business on the Board of Trade are in any way adequate or sufficient to handle any such amount of property were there an effort or an intention toward delivery. On the contrary, we call your Honor's attention especially to the fact that there is absolutely no provision whatever made for deliveries of grain on the Chicago Board of Trade, other than in almost any manner that a party having it may choose to deliver it. The testimony shows that the cash transactions on the Chicago Board of Trade are made without reference to any special hours and are made at tables, and on the floor, and off from the grain pits where the big trading is going on for future delivery and where these quotations originate which are the subject matter of this suit. Quite the reverse to this proposition are the methods and rules and appliances created and inaugurated by the Board of Trade for the *cancelling of contracts.* The Chicago Board of Trade clearing house is the most complete, highly evolved piece of cancelling machinery that was ever introduced into the commercial world. A study of its operation and the rules of the Board of Trade under which it operates shows conclusively that all the business done on the Board of Trade from day to day and hour to hour (except the infinitesimal part of it which results in actual deliveries) is canceled at one hour

and at one price for the whole transactions of the day. If the combined trade to-day in the pits of the Chicago Board of Trade amounts to fifty million bushels, it necessarily follows that fifty million bushels are tomorrow "rung up" and cancelled at the settling price arbitrarily fixed by the board of directors without any further trade between the members whatever, and while the members make the initial contract, the clearing house does the rest and cancels them without any further trade or any further personal negotiations regarding such trades as between members. This is also a truth that must be beyond question, because, were not this so, these contracts would not settle, and when delivery day arrived, instead of having, as they do, still open a few million bushels to be delivered, there would be billions of bushels open on the books of the various members of the Board of Trade and the business of the board would be absolutely congested and stopped in the frantic effort to receive and deliver and pay for this property. The clearing house performs a double service for the members of the Board of Trade. It relieves them of the necessity of making direct settlements, and it also relieves them of one-half the trading that would be necessary did every man settle his contract with each other man, as is usual in the general business done in the commercial world. To illustrate this, if A has five thousand bushels of wheat bought from B and five thousand bushels of wheat sold to C, in order to close these contracts it would be necessary for A to make either a delivery to C and receive the wheat from B, or to cancel those trades with each of these men, but the clearing house steps in and you never are obliged to see either B or C again regarding these two open contracts. A puts in his claim with the clearing house for a profit as against C to whom A has the property sold, if the contract shows A a profit, or A notifies the clearing house that A owes B, if the contract shows a loss to A, and A receives from the clearing house the profit he made in the transaction, or he sends the clearing house his check to pay the loss he made in the transaction and that forever settles these two trades A had with these two men, and in which he *had only one-half of each contract on the board.* In other words A had agreed to receive from B a certain amount of wheat and

had agreed to deliver to C a certain amount of wheat, *neither of which contracts he carried out*, and never again spoke to B or C or made any negotiations whatever with either of them regarding the above hypothetical transaction.

This estimate as to deliveries in proportion to the amount of grain handled by the cash houses of Chicago is very closely borne out by the testimony of the manager of Armour & Company. He testified that they handled fifty million bushels of grain, hedged it all on the Chicago Board of Trade, and delivered about one-sixth of it.

"It must also be borne in mind that there are not to exceed twenty-five large grain handlers members of the Chicago Board of Trade, and the balance of 1,975 members of the Board of Trade are engaged in what is known and denominated there as "speculative business," and the distinction made all the time between a cash handler and the broker who trades for future delivery being, in Board of Trade parlance, "cash houses" and "speculative houses." Mr. Warren spoke very truly when he told Mr. Christie, as recited in the evidence, "that sixty men could do all the cash business and that there were eighteen hundred of them trying to make a living up there."

Suppose the Kansas City Stockyards Company concluded to sell cattle and hogs for future delivery, and in order to do this effectively, they took the four months of May, July, September and December as the delivery months during the year. Suppose they started in the first day of January and bought and sold daily for delivery in May one hundred thousand head of hogs and cattle, and that each night after the close of business they cancelled off these trades made during the day, contracts that amounted to ninety thousand head, and to facilitate the cancelling of these contracts, they inaugurated a clearing house, receiving and paying differences on these cancelled trades through this clearing house, and the only function of the clearing house being to facilitate the cancelling of these contracts (this clearing house being an elaborate piece of commercial machinery expensively maintained), and that no facilities or arrangements were made for *delivering and receiving the actual hogs and cattle* other than are open at the present time, namely, some pens to put them in, with a capacity not equal

to the caring for one-tenth of the hogs and cattle daily contracted for future delivery on the exchange. Suppose they continued this business year in and year out and an investigation of it showed that not more than one head of live stock was ever delivered on contracts that had been made for the delivery of three thousand, would this Court hold that these people under these circumstances intended to receive and deliver the property so bought and sold, when it was beyond human possibility that the delivery of this property could be made as contracted for, and would you not be irresistibly forced to the conclusion that the Stockyards Company *"kept a place,"* and that their clearing house system and their rules governing the cancellation of these trades were of such a character that it clearly proved *"they did not intend to receive or deliver"* the property so bought or sold?

Mr. Warren, the president of the Board of Trade, testified that if the bucket shops were closed the Board of Trade would get more business, because the trades made in the bucket shops would be executed on the Board of Trade. Mr. Warren, president of the Chicago Board of Trade and Mr. Robbins, its attorney, have for the last four years labored earnestly and strenuously to show that all contracts made off of boards of trade are mere bets and gambling transactions. Does not Mr. Warren's admission that the Board of Trade would be benefited if these same bets were placed on that board really stamp the transactions of that board, under his own testimony, as like in character to those transactions made in offices off the Chicago Board of Trade? Further, if it is true, as charged by these complainants, that all transactions in grain and provisions made for future delivery off the Chicago Board of Trade are mere bets, is it not an absurdity for the Board of Trade to claim that these bets could in any way effect *legal* contracts made on that exchange? The argument advanced that this speculation is legitimate and necessary because of the support it gives to the market, is absurd, as any student in political economy well knows, if he is not advanced further than the primer in that study, that *prices go up and down in response to the inexorable law of supply and demand,* and it needs but to call the Court's attention to the prices of corn in

1900 as compared with the prices of corn in 1901 to show how quickly and absolutely this law operates. In the year 1900 we raised 2,105,102,516 bushels of corn, and the average price of corn during that year was not above thirty-eight cents per bushel. In the year 1901 we raised 1,359,354,000 bushels of corn, and while the average price for corn on this crop cannot be computed, as the crop year is not completed, since August 1 of last year the average price of corn has been close to sixty cents per bushel, because of the shortage of 745,748,000 bushels in this year's production. We wish to call attention to the fact that the transaction for future delivery on the Chicago Board of Trade from day to day and from hour to hour must be exactly equal. Every time a man buys anything on that exchange, some other man *must sell* it, consequently, the buying and the selling on the exchange are forever even, and if it were not true, as above stated, that *supply and demand* caused the fluctuations in the market, prices would absolutely, so far as the Board of Trade is concerned, be at a standstill, because of the reason above stated. There can be no purchase without a seller, and as the buying and selling are always equal, there could be neither an advance nor a decline in the market. This proposition takes out all the argument by the board as to the effect of these contracts on the board. Without the outside influences which make prices go up and down (finally and primarily the law of supply and demand), the markets of the Chicago Board of Trade would never fluctuate one-quarter of a cent per bushel on the price of any commodity there traded in.

We wish to further call your attention to the Board of Trade's definition of a bucket shop, as evidenced by Mr. Warren's testimony and by the contract which they have and require to be signed by every house to whom they allow the Board of Trade to furnish their quotations. After reciting many things which they prohibit (but which they permit daily and hourly on the Board of Trade), they then make the supreme test of bucket shop, or no bucket shop, to be as to whether or not the contract is made on the Board of Trade or off the Board of Trade. If made on the Board of Trade, it is all right and legitimate, but if off, it is gambling, and wicked, and a bucket shop transaction. The Christie

Grain & Stock Company might have been allowed to use the Chicago Board of Trade grain quotations if they had signed this iron-clad agreement not to make a trade for future delivery anywhere on earth except on the Board of Trade. Because they would not agree to do this the Board of Trade immediately denominated them as a bucket shop and seeks this injunction, entirely ignoring the definition of a bucket shop made by the statutes of both Illinois and Missouri, and asserting to themselves the right to define what are and what are not legal transactions, and to act as judge and jury as to business done by the Christie Grain and Stock Company, and deciding that they are a bucket shop without even making any inquiry as to their methods or the character of business which is done in their house.

We claim that it is clearly shown that the corporation, the complainant in this case, the Chicago Board of Trade, *"keeps a place," "maintains a clearing house,"* and makes rules and enforces the same to facilitate the buying and selling of grain and provisions for *future delivery without any intention to receive or deliver the same,* and its members under these rules are by compulsion forced to cancel and "Ring up" these deals without any reference to delivery, and to settle the same from day to day through the clearing house, and that the whole scheme is in violation of the statutes of both Illinois and Missouri.

Counsel for complainants in their brief and oral argument constantly kept referring to the definition of bucket shop as defined by the United States revenue laws for taxation, but that has nothing to do with this proposition whatever. It is the statutes of the states of Illinois and Missouri that we are discussing; and, those statutes provide that a party who keeps a place wherein is permitted the buying and selling of grain or commodity for future delivery without an intention on the part of the parties to deliver the same when sold or receive the same when purchased, shall be adjudged the keepers of a bucket shop and are subject to punishment; but, even under the definition of the United States government as to revenue tax as to what constitutes a bucket shop we say that the Board of Trade of Chicago is bucket shopping and producing the

quotations as the result of bucket shopping because one of the provisions of that law in defining bucket shopping is the settling of deals or closing them out when prices shall reach a certain figure fixed by the boards of trade.

Now, we find from the testimony in this case that the Board of Trade of Chicago was engaged in this very business because we find that every day it fixes a settling price, through its board of directors, and posts the same in exchange hall and in the settling room and provides that all settling done upon the speculative business of the day shall be settled and adjusted according to its fixed settling price arbitrarily fixed by the Board of Trade and posted up by it, which, even according to the United States government's revenue definition also conclusively shows that they are carrying on the business and aiding the carrying on of the business producing the quotations in violation of the law.

We wish to call your Honor's attention to the Board of Trade clearing house report filed as an exhibit (page 112), showing the amounts cleared and differences paid through the clearing house to have been during the year 1900, $62,227,165.25. This amount, you must understand, is simply the amount of differences between the profits and losses paid in these trades cancelled through the Board of Trade clearing house. The Board of Trade makes *no* report of *actual* grain delivered and paid for on these contracts made for future delivery. The testimony shows that not to exceed forty million bushels in quantity and not over twenty-six million dollars in value were delivered on these speculative contracts during the year 1901, and we again suggest that this showing is another unanswerable argument to the proposition that they do not intend to receive or deliver when the total value of the cash property delivered on these contracts during the year is less than one-half of the amount of money paid in profits and losses on the transactions they are supposed to represent.

In this connection we desire to call the Court's attention to the case of "Puts and Calls and Option Dealing."

113 Ill., 228, *Pearce v. Foote.*

And also to the case

Sobey v. People, 134 Ill., 66.

ULTRA VIRES.

Now, another proposition to which we wish to invite the Court's attention is found in this, that the Board of Trade was incorporated as a charitable institution and not as a business institution or a business corporation, and the act of the legislature incorporating it found in the rules herewith on page 7 provides:

"Said corporation shall have no power or authority to do or carry on any business except such as is usual in the management of boards of trade or chambers of commerce, or as provided in the foregoing sections of this bill."

Then we find in defining this that the Board of Trade itself, in its objects, defines them as follows:

"To maintain a commercial Exchange; to promote uniformity in the customs and usages of merchants; to inculcate principles of justice and equity in trade; to facilitate the speedy adjustment of business disputes; to acquire and to disseminate valuable commercial and economic information . . . " So that it is seen that this corporation was not originally incorporated for the purpose of carrying on business or to monopolize the grain business of the world, but, as rather a charitable institution, and one of its purposes is declared to be that for which for thirty years it has been doing, to acquire information in reference to the grain markets and to disseminate the same.

Instead of, however, confining itself to a fraternal and charitable business and mutual welfare of its members, we find that it has now become one of the wealthiest and most gigantic corporations of the age; that it is owning property in excess of its charter provision to the extent of the value of many millions of dollars; that it has gone into the business of subsidizing telegraph companies and trying to sell its market quotations to the public carriers for thirty thousand dollars a year; and, it has become a pecuniary corporation, and is now engaged throughout the country in attempting to monopolize the entire speculative grain business of the United States, and in its "inculcating its principles of justice," it has gone into the injunction business, first, having made a con-

tract with the telegraph company by which it seeks to prevent anybody from receiving any information in reference to the public markets unless such parties shall be first approved by the Board of Trade, and then going out to compel everybody in the United States to come in under its contract and submit to the dictation of the Board of Trade through its members; place all of their bucket shop transactions through members of the Board of Trade, or else go out of business.

And thus it has become, and if its scheme now in hand by this injunction system shall succeed, it will be the most gigantic monopoly that the country has ever heard of, and no dealer in futures, whatever his object or purpose, can be permitted to transact business unless he goes to some one in the Board of Trade of Chicago and places his deals there. This is the "inculcating principles of justice" proposed by this Board of Trade under its "charitable" charter provision.

Now we maintain that the contract in question and the situation of the Board of Trade as well as the telegraph companies, places them in such a position and relation as that their doing and transactions are *ultra vires* of the corporation, and for that reason, if no other, they have no standing in a court of equity.

101 U. S. 71, *Thomas v. Railroad.*
41 M. A. 665, *Bowman v. Mooney.*
57 Ind., 495, *Western Union Tel. Co. v. Ferguson.*
99 Ill., 487, *Cope v. District Fire Ins. Co.*

Respectfully submitted,

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